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In the Supreme Court of the United States

OCTOBER TERM, 1955

No.

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN DAVID PROVOO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the District of Maryland (R. 1161–1193) is reported at 17 F. R. D. 183, and is set forth in Appendix A, *infra*, pp. 25–71.[1]

JURISDICTION

On October 27, 1954, appellee was indicted for treason, in violation of 18 U. S. C. (1940 ed.) 1, 2 (now 18 U. S. C. 2381). On March 15, 1955,

[1] The following two opinions, which are referred to in the Statement, *infra*, pp. 10–11, are related to but not directly involved in the present case: *United States* v. *Provoo*, 124 F. Supp. 185 (S. D. N. Y.), and *United States* v. *Provoo*, 215 F. 2d 531 (C. A. 2).

the District Court entered an order dismissing the indictment (App. A, *infra*, pp. 71–72), and the United States filed its notice of appeal in that court on April 13, 1955 (R. 1196–1197). On June 3, 1955, by an order of the District Court entered pursuant to Rule 13 (1) of the Revised Rules of this Court, 346 U. S. 959, the time for docketing the case in this Court was enlarged to and including July 1, 1955 (R. 1207).

This Court's jurisdiction to review by direct appeal the District Court's order of March 15, 1955, is conferred by 18 U. S. C. 3731, which provides for direct appeal by the United States to this Court from a decision of a district court in a criminal case "sustaining a motion in bar, when the defendant has not been put in jeopardy." This section is applicable since the order appealed from was entered prior to the commencement of trial and was based upon grounds which operate as a permanent bar to appellee's reindictment. See *United States* v. *Hark*, 320 U. S. 531, 535–536.

QUESTION PRESENTED

In 1949, appellee, a former Army enlisted man, was indicted in the Southern District of New York for alleged acts of wartime treason committed between 1942 and 1945, while a prisoner of war of the Japanese. His arrest for treason by F. B. I. agents followed his discharge from the Army, which had been given him in New York at the request of the Department of Justice.

This request was shown to have been made on the Department's assumption that under the venue provisions of 18 U. S. C. 3238 appellee would be "found" wherever he was first arrested on the treason charges, and that it would be preferable to bring the prosecution in New York, rather than in Maryland, where appellee was then stationed. Following a long jury trial, he was convicted and sentenced to life imprisonment, the trial court sustaining the Government's interpretation of the venue statute. However, in August 1954, the Court of Appeals for the Second Circuit reversed the conviction because of (1) erroneous trial rulings on the scope of cross-examination and (2) improper venue.

Accordingly, in October 1954, a new treason indictment—the one here involved—was returned in the District of Maryland. The court below dismissed this indictment, holding that appellee was entitled to avoid further prosecution, by reason of the Government's decision to bring the case in New York, which was deemed to have caused "unnecessary delays" and to have denied appellee his right to a speedy and fair trial.

The question presented is:

Whether the erroneous selection of New York for venue purposes denied appellee his right to have a speedy or fair trial, or constitutes adequate grounds for permanently barring the Government from trying him in the proper district.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

The Fifth Amendment provides, in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.

Title 18 U. S. C., Section 3238 provides:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.

Title 18 U. S. C. (1940 ed.), Section 2 (now contained in 18 U. S. C. 2381) provided, in pertinent part:

> Whoever is convicted of treason shall suffer death; or, at the discretion of the court, shall be imprisoned not less than five years and fined not less than $10,000 * * *.

Title 18 U. S. C., Section 3281 provides, in pertinent part:

> An indictment for any offense punishable by death may be found at any time without limitation * * *.

Rule 48 (b) of the Federal Rules of Criminal Procedure, provides:

> If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

STATEMENT

Appellee is a former enlisted man in the United States Army. He has been twice indicted for certain acts of treason allegedly committed between 1942 and 1945, while he was a prisoner of war of the Japanese. The overt acts charged in these indictments include offering his services to the Japanese; broadcasting for the Japanese; attempting to persuade a fellow prisoner to give the Japanese information about secret American codes and ciphers; and reporting that a fellow prisoner (an American officer) was engaged in anti-Japanese activities, thereby causing his execution by the Japanese.

Appellee was first indicted in November 1949, in the Southern District of New York, where he was tried, convicted, and sentenced to life imprisonment. This conviction was reversed on August 27, 1954, by the Court of Appeals for the Second Circuit, on grounds of trial error and improper venue. As regards venue, the court decided that appellee should have been tried in Maryland.

In conformity with this decision, the Government transferred the prosecution to the United States District Court for the District of Maryland, where a new treason indictment was returned on October 27, 1954. Appellee then moved to dismiss this indictment, claiming that the 1949 selection of New York as the place of trial, first held erroneous on appeal, had denied him a speedy trial, had caused "unnecessary delay" within the meaning of Rule 48 (b) of the Federal Rules of Criminal Procedure (*supra*, p. 5), and had deprived him of rights under the Fifth and Sixth Amendments.[2] Following a hearing, the District Court granted this motion and, by an order entered March 15, 1955, dismissed the indictment.

1. *The facts*, which were developed at the hearing and found by the District Court, may be summarized as follows:

Following appellee's liberation by American troops from a Japanese prisoner of war camp, he was held in custody by American Army authorities from August 1945 to April 1946, pending an investigation of certain radio broadcasts alleged to have been made by him from Japan while a prisoner of war. He was then released without the preferment of charges. In August 1946, upon his return to the United States,

[2] Appellee also sought relief by a petition for habeas corpus on similar grounds, but this petition was denied (App. A, *infra*, p. 73).

he was honorably discharged. In the following month he reenlisted in the Army for a period of three years. (App. A, *infra*, pp. 28–33.)

In August 1948, the Department of Justice, through the Federal Bureau of Investigation, began to investigate appellee's alleged misconduct while a prisoner of war, with a view to possible prosecution for treason. The Department of Justice informed the Army of this investigation and requested that appellee be made available as needed and that he not be discharged until the investigation could be completed. (App. A, *infra*, pp. 33–34).

Approximately six months after the commencement of this F. B. I. investigation, appellee, while stationed at Fort Meade, Maryland, became involved in an incident with another enlisted man (R. 911). This led to the bringing of charges against appellee for sodomy and other offenses under the 93d and 96th Articles of War (R. 912), on account of which he was hospitalized for several months' observation and then placed in confinement pending a decision whether a court-martial should be held (R. 430, 913–914). After completing its investigation, the Army ultimately decided that appellee should not be tried by court-martial (R. 428), but that he was disqualified for further Army duty and should be given an undesirable discharge (R. 928–929). The Army then notified the Justice Department of its decision,

stating that appellee could neither be retained in the service and restored to duty nor be kept indefinitely in confinement pending completion of the F. B. I. investigation (R. 434). The Justice Department, concluding that under these circumstances it would be desirable to bring the proposed treason prosecution in the Southern District of New York rather than in Maryland or elsewhere, thereupon requested the Army to arrange, if possible, to have appellee transferred to that district for discharge, explaining that venue would be established wherever he was first arrested on the treason charges (R. 443–447). Pursuant to this request, the Army transferred appellee under guard to Fort Jay, New York, where he was discharged on September 2, 1949. (App. A, *infra*, pp. 33–45).

Immediately upon his discharge, appellee was arrested by the F. B. I. on the treason charges and placed in federal custody pending indictment and trial. On November 17, 1949, an indictment charging him with twelve acts of treason committed while a prisoner of war was returned in the United States District Court for the Southern District of New York. (App. A, *infra*, pp. 45–46, 49).

Extensive pre-trial proceedings followed, a summary of which is set forth in Appendix B, *infra*, pp. 74–76. The complexity of the case, necessitating, *inter alia*, defense depositions and investigations in various parts of the world, caused

substantial delay. Appellee was also given several psychiatric examinations, but each time was found to be sane and capable of standing trial. In March 1951, appellee petitioned for a writ of habeas corpus, claiming that his Army discharge had been illegal, that he had been "forceably thrust" into the district where he had been indicted, and that he was being denied a fair and speedy trial. At the hearing of this petition, which was denied, appellee personally requested an immediate trial, but his counsel stated that he could not go to trial without the depositions, and would withdraw if forced to do so. Concededly, appellee's counsel was not ready for trial at the earliest until June, 1951 (App. A, *infra,* p. 47). While the case was dropped from the trial docket in October 1951, over appellee's apparent objection, as a result of the assignment of new trial counsel by the Government, the record shows no action by appellee to bring the case on for trial until June, 1952, just as the summer recess was starting (App. A, *infra,* pp. 46–48).[3]

Pursuant to this motion, the case was set down for trial, which began on October 27, 1952. Upon the completion of the Government's case in December 1952, the trial was interrupted at the request of appellee's counsel for the purpose of taking additional depositions of witnesses in

[3] Under the practice in the Southern District of New York, the case could have been restored to the trial docket on five days' notice (R. 387).

Japan, Australia, and England. The trial ended on February 11, 1953, when a jury found appellee guilty of four of the overt acts alleged. On February 17, 1953, he was sentenced to life imprisonment, and he appealed. The next fourteen months were taken up with motions and proceedings in connection with the appeal, including proceedings for the correction of sentence (the addition of a mandatory fine), change of counsel for appellee at his own request, and the granting of a number of requests by his new counsel for extensions of time in which to perfect the appeal. (App. A, *infra*, pp. 48–49).

On April 13, 1954, while the appeal was pending, appellee filed a motion in the District Court where he had been convicted, requesting that his conviction be set aside on the ground that he had been indicted and tried in the wrong district. He contended that in the circumstances of this case the proper venue was the District of Maryland, the district in which he claimed to have been "found" within the meaning of 18 U. S. C. 3238 (*supra*, p. 4). On May 12, 1954, this motion was denied. *United States* v. *Provoo*, 124 F. Supp. 185. The court's opinion (per Noonan, D. J.) analyzed the pertinent authorities, and summarized its conclusions as follows, at 191:

> This court concludes that the petitioner was "found" in New York by virtue of his arrest at Fort Jay. The documentation of the request by the Justice Department that

> he be discharged in New York does not affect the fact that he was so "found."

Appellee's appeal from the denial of this motion was consolidated with his main appeal. On August 27, 1954, the Court of Appeals for the Second Circuit reversed the conviction for trial error (prejudicial cross-examination of appellee) and also reversed the trial court's post-conviction ruling on the venue motion. *United States* v. *Provoo,* 215 F. 2d 531. With respect to the venue point, the court stated, at 538:

> * * * we hold that the continuance of Provoo's restraint in Fort Meade, after the Army had dropped the sodomy charge, for the purpose of bringing him to New York for trial, was an apprehension for treason and that he was "found" in Maryland within the meaning of the venue statute.

Thus, on October 5, 1954, the court issued its mandate remanding the case "for further proceedings consistent with" its opinion.

In accordance with this decision, appellee, on October 27, 1954, was indicted in the District of Maryland, to which district he was brought from New York and where he was continued in custody until his motion to dismiss the indictment was granted. Neither he nor his counsel requested a psychiatric examination, and at the hearing no psychiatric or medical testimony was offered relating to his present mental condition. Nor was any showing made that his condition had

changed since 1952, when he had been found to be "legally sane" though "emotionally unstable" (App. A, *infra*, pp. 47, 52).

In addition to the facts summarized above, it was shown that two of appellee's witnesses who had testified at the first trial had since died (App. A, *infra*, pp. 50–51). However, concededly neither of these witnesses had testified to, nor had either any knowledge of, any of the overt acts with which appellee was charged.

2. *The decision dismissing the indictment.* Appellee's motion seeking dismissal of the Maryland treason indictment was filed under Rules 12 and 48 (b) of the Federal Rules of Criminal Procedure.[4] He asserted that the lapse of time between his indictment in New York and the Second Circuit's decision that he had been tried in the wrong district was so great that he was entitled under the Constitution and Rule 48 (b) to escape having to stand trial in the proper district. This motion was granted, although the District Court (per Thomsen, D. J.), specifically

[4] In addition, he filed a new motion questioning venue. In this motion he argued that venue should have been in the District of New Jersey rather than the District of Maryland, claiming that he had been "found" within the meaning of the statute in that district in 1946 shortly after his return from Japan. This motion was denied by the court below on the ground that it was without evidential support and on the further ground that, since appellee had successfully contended in the New York proceedings that he had been "found" in Maryland, he was "estopped to deny" having been found in that district in this proceeding (App. A, *infra*, p. 53).

found that "the principal delays in New York were the law's delays" (App. A, *infra*, p. 64), and expressly refused to sustain appellee's contention that the Government had acted in bad faith (App. A, *infra*, pp. 66–67).

In upholding appellee's contention that the Government had lost the right to try him in the proper district, the court held the Government responsible for all delays which might in any way be attributable to the Department of Justice's conclusion that the applicable venue statute permitted trial in New York. "The serious delay," said the court, "was not the delay in bringing the New York case to trial [1949–1952], but the delay caused by the deliberate act of the government in bringing the case in New York in the first place, when the government must have known that venue in New York was at best doubtful, and took the chance for the supposed advantage to the government of proceeding in New York" (App. A, *infra*, p. 65). The court further stated that "where the government chooses to proceed in a certain district in a doubtful case of venue, when venue in another district is clear, the government must be held responsible for the effects of its election" (App. A. *infra*, p. 66).

Placing his decision both on constitutional grounds and as a matter of judicial discretion purportedly exercised pursuant to Rule 48 (b), Judge Thomsen summarized his ruling as follows (App. A, *infra*, p. 70):

> I conclude that Provoo cannot have a fair trial at this late date,[5] that he has been denied the right of speedy trial within the meaning of the Sixth Amendment, and that there have been unnecessary delays in indicting him and bringing him to trial. Further prosecution of the indictment would violate the fundamental principles of justice and fairness which we must apply * * *.

THE QUESTION IS SUBSTANTIAL

The decision below holds in effect that where Government law enforcement officials believe in good faith that they have a choice of districts in which to prosecute a serious offense committed overseas and make a selection which, following

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[5] The court's conclusion that appellee "cannot have a fair trial at this late date" is apparently based on the following passage of its opinion (App. A, *infra*, pp. 52–53):

"* * * The long periods of imprisonment have caused other prejudice to the defendant beside[s] the deprivation of his freedom, with a capital charge hanging over him. He has been handicapped in his ability to locate and keep in touch with possible witnesses. But even more serious has been the effect on Provoo himself. In 1952, Dr. Zinkin, of the United States Public Health Service, diagnosed Provoo's condition as a severe mixed psychoneurosis, and said that 'although he is considered legally sane, he is emotionally unstable, prone to hysterical states and has suffered severely under the pressure of long confinement.' It is evident to a layman who has observed Provoo in court and in chambers on a considerable number of occasions, that his condition is no better now. His ability to cooperate with his counsel in preparing his defense, and to testify in his own behalf with respect to matters which occurred from 1942 to 1945, has obviously deteriorated during the years in prison."

trial and conviction, is held on appeal to have been erroneous, the Government is thereafter permanently barred from prosecuting the offense in the proper district, on the ground that the accused has by the Government's error been denied a speedy trial and prevented from obtaining a fair retrial. This holding involves an interpretation of the Fifth and Sixth Amendments and of Rule 48 (b) of the Federal Rules of Criminal Procedure which is both novel and erroneous. It carves out new law far beyond what is called for either by prior federal decisions or by the requirements of procedural fairness. It creates needless uncertainty and confusion and has far-reaching implications in the effective administration of criminal justice in the federal courts.

1. It is, of course, impossible to bring about the complete elimination of mistakes by either judges or trial lawyers, no matter how capable or conscientious they may be. Thus the retrial of a criminal case, following the reversal of a conviction on appeal, is necessarily a commonplace occurrence. On occasion the second trial may also result in reversible error, thereby necessitating yet another trial. Unfortunately, every retrial involves delay, expense and possible prejudice, all of which could have been avoided had either counsel or the trial judge been able to predict the adverse appellate ruling. Neither this Court nor any of the Circuits has heretofore

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ever held that the delays attributable to errors necessitating the reversal of a conviction violate the constitutional rights of an accused to have a speedy trial, or preclude the holding of a fair retrial, or constitute adequate grounds for forbidding further prosecution.

As this Court clearly recognized in *Beavers* v. *Haubert*, 198 U. S. 77, 87:

> The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.

So far as the speediness or fairness of the accused's trial is concerned, it should make no difference—assuming good faith—whether the error necessitating the retrial is that of the judge or of the prosecutor. Likewise, it matters not whether the error pertains to the venue of the prosecution or the jurisdiction of the court or to some aspect of the trial itself. In short, neither as a matter of constitutional right nor of wise judicial administration does it, or should it, make any difference whether the error requires retrial in the same district or in a different district.

The constitutional provisions guaranteeing a speedy and fair trial and Rule 48 (b) of the Federal Rules of Criminal Procedure are all designed to achieve similar objectives. Their purpose is to assure that persons arrested or formally charged with crime may avoid the prejudice of needless

inaction. However, these same provisions cannot be used, without undue interference with the "rights of public justice", to insulate an accused from all further prosecution, because conscientious law enforcement officers erroneously interpreted an ambiguous venue statute. This is especially so where, as here, the Government's venue decision was initially sustained as proper in a carefully reasoned opinion, 124 F. Supp. 185, which was ultimately reversed on appeal, following delays which were expressly found to be principally "the law's delays" (App. A, *infra*, p. 64).*

The right to a speedy trial arises only after a formal complaint is lodged against the accused. *D'Aquino* v. *United States*, 192 F. 2d 338, 350 (C. A. 9), certiorari denied, 343 U. S. 935. The accused's normal method of speeding his trial, in the face of what he conceives to be unnecessary delays, is a demand for trial addressed to the court; if he fails to get relief in this manner, mandamus is the proper remedy. See *Frankel* v. *Woodrough*, 7 F. 2d 796, 798 (C. A. 8); *Fowler* v. *Hunter*, 164 F. 2d 668, 670 (C. A. 10), certiorari denied, 333 U. S. 868. As is well known, those charged with crime are frequently anxious, for one

* That the venue issue was an arguable one is clear not only from the opinion of District Judge Noonan containing a review of the authorities which he and the Government thought supported the Southern District of New York as the proper venue under the circumstances of this case, but from the opinion of the Second Circuit itself, 215 F. 2d at 537–539.

reason or another, to postpone the date of their trial as long as possible. Thus, failure to demand or move for a speedy trial is properly held to constitute a waiver of the right. *Pietch* v. *United States,* 110 F. 2d 817, 819 (C. A. 10), certiorari denied, 310 U. S. 648; *Collins* v. *United States,* 157 F. 2d 409 (C. A. 9).

It is clear from these decisions that the prosecution is entitled, in the interest of public justice, to due notice that any particular defendant in fact desires to claim his right to a speedy trial and is ready to proceed to trial. While the District Court concluded that defendant's counsel was ready for trial in June 1951, he thereafter made no motion to have the case set down for trial until June 1952, just as the summer recess was starting. Once this motion was made, the case was promptly brought to trial a month after the completion of the summer recess. Considering the complexity of the case and that many witnesses had to be brought from Japan and elsewhere, there was clearly no unreasonable delay in trying the case once this motion was made. Thus, this case is far different from *United States* v. *McWilliams,* 163 F. 2d 695 (C. A. D. C.), where the Government had requested repeated continuances in order to try to obtain additional witnesses and defense counsel had repeatedly moved for a prompt trial date over objections by the Government, before the case was finally dismissed, with a strong dissent by Judge Edgerton.

To hold that the record here is sufficient to sustain appellee's claim that he has been denied a speedy trial and precluded from obtaining a fair one, and hence is entitled to immunity from further prosecution, would only encourage other defendants to refrain from making effective moves to bring on their cases for trial, in the hope that some prosecution error plus the lapse of time might permit their ultimate escape from a valid trial on the merits.

2. The erroneousness of the decision below is further emphasized by three additional factors here present.

First, the offense involved, treason, is a capital offense for which there is no statute of limitations. Under 18 U. S. C. 3281 (*supra*, p. 4), a prosecution for treason may be commenced "at any time". Thus Congress has indicated that for treason and other capital offenses the element of time has less weight than with other crimes.

Secondly, there is no actual causal nexus between the Government's erroneous choice of venue and the relatively late date at which appellee would have gone to trial under the present indictment. Since the Second Circuit held that error as to the scope of cross-examination occurred at appellee's first trial, 215 F. 2d 531, he would in any event have had to be tried again during 1955, even if the additional error as to venue had not been committed. Thus his position is in fact not significantly different from

what it would have been if no mistake of venue had been made.

Thirdly, it is clear from the opinion below that the District Court did not find and was not basing its decision on any supposition that the Government's "mistake" in its initial selection of venue was other than an "honest mistake" (App. A, *infra*, pp. 66–67).[7] Instead, the court below concluded that even an *honest mistake relating to venue* justified dismissal of the new indictment, under which the Government was ready to proceed promptly. It so held even though conceding that "when the government has a choice of venue it may elect to prosecute in the district of its choice for almost any reason," and that "in the ordinary case, at least, the court will not inquire into the reasons for its choice" (App. A, *infra*, p. 66).

[7] 18 U. S. C. 3238 (*supra*, p. 4), providing that the trial of offenses committed outside the country should be in the district in which the offender is "found" or into which he is "first brought", was not adopted pursuant to "the constitutional concern for trial in the vicinage" (*United States* v. *Johnson*, 323 U. S. 273, 276), but merely to establish venue. Its artificiality is indicated in this case. After the Second Circuit held the Southern District of New York to be the wrong district in which to prosecute appellee and the District of Maryland to be the right one, in conformity with appellee's contention on appeal, appellee urged in the court below that the District of Maryland was the wrong district and the District of New Jersey was the right one (see fn. 4, *supra*, p. 12).

3. The record does not sustain the District ourt's conclusion that appellee "cannot have fair trial at this late date" (App. A, *infra,* 70), either as a proper exercise of judicial scretion or, *a fortiori,* as a matter of constitu-onal law. No defense witness in the earlier ial who had any knowledge whatever concern-g appellee's alleged treasonable conduct would, far as appears, be unavailable for the new ial. Moreover, the New York testimony of the o defense witnesses who have died since the ew York trial will be admissible in evidence at e new trial as an exception to the hearsay rule. *attox* v. *United States,* 156 U. S. 237, 240–244. so, the record before the District Court does t sustain its conclusion that appellee had be-me any more emotionally unable to cooperate th his counsel in preparing his defense than had been in 1952, when he was given the last three psychiatric examinations and found pable of standing trial. If appellee could have en fairly tried in 1952–1953, he can be fairly tried now. There is not the least suggestion the Second Circuit's 1954 opinion, 215 F. 2d 1, either that a fair trial could not have been ld in 1952 and 1953, or that a fair retrial could t be held in 1955.

Throughout its opinion the court below clearly dicates that its view that appellee cannot now ve a fair trial is but a facet of its fundamental lding that appellee has been wrongly denied

a speedy trial by reason of the Government's initial erroneous choice of venue. The court's "fair trial" and "speedy trial" holdings are thus inseparably linked. Since the "speedy trial" holding is erroneous, the dismissal of the indictment cannot be justified alternatively on the "fair trial" ground. Both grounds for dismissal are directly contrary to the clear implication of the Second Circuit's opinion that appellee was subject to retrial in the proper district.

In any event, the problem of locating witnesses years after the occurrence of the events witnessed is not peculiar to this case. It is a common problem in criminal trials, particularly trials for capital offenses, like that here involved, with respect to which there is no statute of limitations. As pointed out above, every witness who testified for the defense at appellee's New York trial with respect to his conduct as a prisoner of war is alive and available. The Government will again, to the full extent authorized by law, provide the funds required for such purposes as the taking of depositions and the securing of United States citizens as witnesses in appellee's behalf, just as was done for him at the New York trial.

So far as appellee's present mental and emotional condition is concerned, if at the new trial a proper motion is made alleging facts indicating a present inability to stand trial, it can be at that time disposed of on its merits.

4. As we have indicated (*supra*, pp. 12, 14), an alternative or additional ground relied upon by the court below in dismissing the indictment was Rule 48 (b) of the Federal Rules of Criminal Procedure (*supra*, p. 5). That rule provides that a court may dismiss an indictment if there is "unnecessary delay" either in presenting the charge to a grand jury after an accused has been held to answer to the district court or in bringing him to trial after indictment. As indicated by the Note of the Advisory Committee, however, this rule is but "a restatement of the inherent power of the court to dismiss a case for want of prosecution." See *Ex parte Altman*, 34 F. Supp. 106, 108 (S. D. Cal.). There has of course not been in this case any want of prosecution in the sense intended. Indeed the opinion below does not suggest that there has been. The three-year lapse of time between the return of the first indictment and the beginning of trial in the Southern District of New York (*supra*, pp. 8–9) was certainly not due to any want of prosecution.[8] As we have already emphasized, the court below made clear that its decision was based, not on "the delay in bringing the New York case to trial", but on the delay which it attributed to the Government's decision in "bringing the case in New York in the first place" (App. A, *infra*, p. 65).

[8] See Appendix B, *infra*, pp. 74–76, where the pre-trial proceedings in the District Court for the Southern District of New York are summarized.

CONCLUSION

The decision below is novel and erroneous and has far-reaching implications in the effective administration of criminal justice. The question presented is substantial. It is respectfully submitted that probable jurisdiction should be noted.

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JUNE 1955.

APPENDIX A—OPINION AND ORDERS OF THE DISTRICT COURT

In the United States District Court for the District of Maryland

Civil No. 8025

IN THE MATTER OF THE PETITION OF JOHN DAVID PROVOO FOR A WRIT OF HABEAS CORPUS

Criminal No. 23076

UNITED STATES OF AMERICA

v.

JOHN DAVID PROVOO

Filed March 14, 1955

THOMSEN, *District Judge.*

John David Provoo, indicted for treason, has filed a petition for a writ of habeas corpus and motions to dismiss the indictment under Rules 12 and 48 (b), FRCrP, claiming that he has been denied a speedy trial, as guaranteed by the Sixth Amendment, and that further prosecution of the charge would deprive him of rights under the Fifth Amendment. He has also filed a motion questioning venue.

The indictment charges continuous treasonable conduct from May 6, 1942, to August 14, 1945, in the Philippine Islands, Formosa, and Japan. Provoo, who was a prisoner of war during that

period, is charged with having adhered to the enemy by offering his services to and working for the Japanese as an interpreter, guide, adviser, radio speaker, etc., by persuading others to give restricted information to the Japanese, and by spying and reporting on the activities of other prisoners. Five of the overt acts are alleged to have occurred on Corregidor: (1) The offer of services; (2) An attempt to persuade a POW to give the Japanese information about secret American codes and ciphers; (3) Ordering a POW to give his boots to a Japanese officer and striking and beating the POW; (4) Advising a POW to give the Japanese information about certain hidden silver money; and (5) Reporting to the Japanese that a POW, Captain Thomson, was uncooperative, anti-Japanese and a threat to the internal security of the military occupation of Corregidor by Japan, which report resulted in the execution of Captain Thomson by the Japanese forces. Two of the overt acts deal with broadcasting over Radio Tokyo in Japan.

An indictment for treason charging those and other overt acts was filed in the Southern District of New York in 1949. Trial was held in 1952–3; Provoo was found guilty of four of the overt acts alleged, and sentenced to life imprisonment. The Court of Appeals for the Second Circuit in August 1954, reversed the conviction because of the admission of certain improper evidence, and ruled that the District Court should have granted a post-sentence motion filed by defendant on the ground that venue is in the District of Maryland and not in the Southern District of New York. *U. S.* v. *Provoo,* 215 F. (2d) 531. The grand jury

for the District of Maryland filed the present indictment on October 27, 1954.

The pending motions, together with the petition for a writ of habeas corpus ad subjiciendum, raise the following points: (1) that the defendant has been denied a speedy trial, as guaranteed by the Sixth Amendment; (2) that trial at this time would deny him due process of law as guaranteed by the Fifth Amendment, in view of the alleged prejudicial and oppressive delays and resultant loss of evidence material to the defense; (3) that such trial would deny him his right to procure witnesses, as guaranteed by the Sixth Amendment; (4) that such trial would deny him his right to a fair trial within the spirit and meaning of the Fifth and Sixth Amendments; and (5) that under all the circumstances, a trial at this time could not be had in accordance with the civilized standards of criminal justice established for criminal trials by the Supreme Court of the United States.

Provoo has also filed a motion challenging venue in this district, on the ground of an alleged arrest at Fort Dix, New Jersey, in 1946.

FINDINGS OF FACT

The facts, as I have found them from testimony and exhibits offered in support of and in opposition to said petition and motions, will be stated chronologically.

Provoo was born in San Francisco, California, in 1917, and was reared and educated there. He had the equivalent of a high school education and two further years of study. He worked several years for a bank, for the Matson Line, for a radio

station, and for his father, who was a painting and decorating contractor. He became interested in Buddhism in early adolescence, was converted to that faith, and in 1940 went to Japan, where he lived in a Buddhist monastery, taught school, and studied Buddhist philosophy. While in Japan he developed his ability to speak Japanese.

Early in 1941 the State Department recommended that all Americans leave Japan. Provoo returned to the United States and enlisted in the United States Army on May 14, 1941. He was sent to the Philippines in June 1941, was promoted to corporal in January 1942, and to sergeant in March 1942, on Bataan. He was captured by the Japanese at the fall of Corregidor on May 6, 1942, and was held as a POW on Corregidor, on Formosa, and in Japan.

It was on Corregidor that several overt acts, including the overt act leading to Captain Thomson's death, are alleged to have occurred. No overt act is alleged to have occurred on Formosa. In 1943 Provoo was transferred to Japan, and was taken by the Kempei-Tai, the Japanese thought police, to Camp Omori, a POW and punishment camp, and later to Camp Bunka, where most of the allied prisoners who were broadcasting over Radio Tokyo were confined. Two of the overt acts deal with Provoo's broadcasting. He denies that he was guilty of any treasonable acts.

The records of the Army show that Provoo was placed under arrest in quarters by the senior American Army Officers at Camp Bunka on or about August 14, 1945, that this state of verbal arrest continued when he was moved to Camp Omori on August 24, 1945, and that on the latter

date he was placed in the custody of Captain Ince, an American officer at Camp Omori, by verbal order of Commander Mahrer, USN, to whom command of that camp had been turned over by the Japanese. Provoo testified that he was arrested by Captain Ince and an Australian officer, Major Cousins, that on the day when the prisoners were liberated Captain Ince requested the Commanding Officer of the liberating forces to arrest Provoo, but that officer refused, and that Captain Ince thereupon rearrested him. In 1945–6 the CIC investigated the participation of Provoo, Ince and others in the broadcasting; in 1948–9 the FBI made a similar investigation, and took long statements from Provoo in connection therewith, which the government offered in evidence in this proceeding; Ince was not called by the government at the New York trial; he was subpoenaed by the defendant there but did not appear.

On August 29, 1945, Provoo was evacuated from Camp Omori to the hospital ship "Benevolence" and remained in custody on that ship and elsewhere until September 12, 1945. He was then arrested by an Army CIC Unit, under an order issued pursuant to authority contained in a radio message from GHQ, AFPAC (General MacArthur's headquarters), dated September 11, 1945, subject "Apprehension and Detention of Certain Individuals," addressed to the Commanding Generals of the Sixth, Eighth and Tenth Armies and the XXIV Corps. The important part of that message, which was confirmed by a letter, is as follows:

THE APPREHENSION AND DETENTION OF PERSONS BY UNITED STATES FORCES IN JAPAN AND KOREA WITHIN ACTUAL ZONES OF OCCUPATION AND WITHIN THE FOLLOWING CATEGORIES IS AUTHORIZED CLN PAREN ONE PAREN CITIZENS AND NATIONALS OF THE UNITED STATES SUSPECTED OF GUILT OF TREASON CMA SEDITION CMA OR WAR CRIMES PD PAREN TWO PAREN CITIZENS AND NATIONALS OF NEUTRAL COUNTRIES SUSPECTED OF GUILT OF WAR CRIME OR WHO COMMIT OVERT ACTS ENDANGERING THE SECURITY OF OUR FORCES PD (CA X 51822) PAREN THREE PAREN CITIZENS AND NATIONALS OF ANY COUNTRY WITH WHICH ANY OF THE UNITED NATIONS IS OR HAS BEEN AT WAR CMA EXCEPT JAPAN CMA WHO ARE OFFICIALLY IDENTIFIED BY THE COUNTER INTELLIGENCE CORPS AS CONSTITUTING A THREAT TO THE SECURITY OF OUR FORCES PD * * * COMPOUNDS FOR THE DETENTION OF THE ABOVE MENTIONED PERSONS CMA PENDING THEIR DISPOSITION BY THIS HEADQUARTERS CMA WILL BE ESTABLISHED BY THE COMMANDING GENERAL * * * EIGHTH ARMY * * * WITHIN THEIR RESPECTIVE AREAS."

Ince and Cousins were held in house arrest in Tokyo. Provoo was taken to jail in Yokohama, and on the next day removed to the XI Corps Stockade. He remained in that stockade until November 16, 1945, when he was removed to

Sugamo Prison in Tokyo, where he was held until April 4, 1946. While in the Yokohama stockade and in Sugamo Prison, he was interviewed by five or six representatives of CIC units of the Army, who took two signed statements from him. I find as a fact that the FBI did not interview Provoo at that time. The FBI had two agents in Tokyo, who served as liaison with the CIC and had access to their reports, but did not participate in this investigation or in any other investigation of military personnel at that time.

Sugamo prison was guarded by an American MP unit. Besides Provoo, there was only two Americans confined there: Mark Streeter and Mrs. Iva Ikuko Toguri D'Aquino, sometimes called "Tokyo Rose," civilians being investigated in connection with the broadcasting. There were a few European prisoners, some non-Japanese orientals, and several hundred Japanese. Provoo was held in close confinement. The CIC agents who interviewed him in Sugamo prison testified that for some weeks he was so emotionally upset that he was disoriented and incoherent, but that they finally obtained a statement from him. His physical condition otherwise was satisfactory. I find that the agents did not use any force, threats, promises, or insulting language in obtaining the statements from Provoo beyond the duress inherent in his confinement and situation.

During the questioning by CIC agent Belinkie, Provoo asked Belinkie to represent him as counsel. Belinkie said he could not do so, since he was in the armed forces. Corporal Pray, who was a chaplain's assistant at Sugamo, testified that almost all of the men in Sugamo asked for

counsel but that no counsel were available. Provoo could not remember whether or not he asked for counsel while at Sugamo, but testified that he asked to be returned to duty. During the time he was in confinement, he was never tried or given a hearing of any sort. On or about March 22, 1946, Provoo sent to the Commanding General of the Eighth Army a 51-page statement, in which he detailed his version of his activities from the date of his enlistment in May, 1941, and denied any treasonable conduct while a POW. The Chief of Legal Section, AFPAC, recommended that no charges be preferred, and on April 3, 1946, orders for the release of Provoo from Sugamo were given. He was released on April 4, 1946. On the same day he was raised in grade to staff sergeant under a Presidential order, which had awarded an advancement of one grade to all military personnel who had been prisoners of war. He understood that he had been completely cleared of all accusations of treasonable conduct. Two days later he was shipped back to the United States under orders.

Upon arrival in the United States, he was sent to Fort Dix, New Jersey, where he was transferred from duty to recuperative leave on April 30, 1946. Some of the records at Fort Dix have been destroyed in ordinary course, but the available records indicate that he remained on recuperative leave until August 13, 1946. Provoo testified that during that period he and his wife (since divorced) visited relatives, but returned to Fort Dix once to obtain some back pay and because Provoo had heard that MPs were looking

for him. He testified that in the Finance Office at Camp Dix he was taken into custody by military police and held over two nights; that he was then released and told that he had been picked up on the old flier which had been issued in September 1945. The morning reports of Provoo's company do not show any such confinement, and in the ordinary course they should have shown it if it had happened. In his application for OCS in 1947, in response to a question whether he had ever been arrested, Provoo gave in his answer the arrest in Japan but did not mention any arrest at Fort Dix. Whether or not Provoo was apprehended and put under moral restraint or confined at Fort Dix by the Provost Marshal in 1946, I find that he was not apprehended for treason in New Jersey and that he was not "found" there within the meaning of Title 18, U. S. C. A., sec. 3238, but that any detention at Fort Dix was for investigation and by mistake.

Provoo received an honorable discharge from the Army on August 17, 1946, at Fort Dix. On September 5, 1946, at Camp Beal, California, he reenlisted in grade in the regular army for a period of three years. He was given various assignments and on occasions received hospitalization and rehabilitation until August 1948, when the Department of Justice, through the FBI, initiated an investigation of Provoo's activities as a POW. The Department of Justice requested the Army to keep Provoo close to Washington, and in August 1948, he was assigned to HQ and HQ Co., 2101 ASU, Fort Meade, Maryland. On that assignment he had no regular duties, but received occa-

sional duties, one of which was to serve as sergeant of a guard which brought a military prisoner from Fort Leavenworth to Fort Meade in March 1949. Upon his return to Fort Meade, a complaint was made that Provoo had been guilty of sodomy and other offenses under the 93d and 96th Articles of War on the train from Fort Leavenworth to Fort Meade. The Army began to investigate the matter, and on April 2, 1949, Provoo was sent, without protest, to Walter Reed Hospital for two months for evaluation in connection with that charge.

The Department of Justice was keeping in touch with the Department of the Army, and on April 1, 1949, Justice requested that Provoo be not confined or tried on those charges. On April 5, a conference was held in the office of the Director of Intelligence of the General Staff, U. S. Army, in Washington, at which the Inspector General and Judge Advocate of the Second Army were instructed that Provoo should not be tried on the charges under the 93d and 96th Articles of War without prior clearance from the office of the Director of Intelligence of the General Staff. On some date which has not been clearly established, but was probably as early as August 3, 1948, Justice had requested Army not to discharge Provoo until Justice had completed its investigation, and the Adjutant General sent instructions to the Commanding General of the Second Army at Fort Meade not to discharge Provoo without the express approval of the Secretary of the Army.

During the first part of Provoo's stay at Walter Reed Hospital, he was emotionally dis-

turbed, but he improved while he was there. Colonel Inwood, the doctor in charge, testified that he was not suffering from any mental disease but from emotional lability; he was and is easily upset, and his mood switches are more marked than in the average person but not enough to put him in the psychotic group. The file of Provoo's case at Walter Reed Hospital, including the history given by him to his attending psychiatrists, was made available to the Department of Justice. On or about April 7, while he was in confinement in the psychiatric ward, he was interviewed by FBI agents. The interview was approved in advance by Colonel Inwood. Thereafter, FBI agents interviewed Provoo four or five times during May 1949, in the psychiatric ward, and took a signed statement from him. I find as a fact that the FBI agents did not obtain the statement by any threats or promises, that Provoo was advised of his rights, and that no insulting or degrading language was used to him. The statement taken at Walter Reed Hospital dealt with certain records of the Tokyo broadcasts, which the FBI agents had with them, and which they played back so that Provoo could identify the voices.

That statement, dated 11 May 1949 and signed by Provoo, recited in its preamble that he had been advised of his right to counsel and that he did not desire counsel at that time. But by military letter dated 12 May 1949 and forwarded through channels to the Commanding General of the Washington Military District, Provoo requested that military counsel be assigned him under the 46th Article of War because he was under

investigation on charges of treason. This request was denied by an endorsement dated 18 May 1949 on the ground that the 46th Article of War authorized the appointment of military counsel only in the case of servicemen undergoing formal investigation by the service under court-martial charges.

In April 1949, before the statement was given, Provoo had a talk with a Washington attorney experienced in criminal cases, who told him that he could go into court and ask for a clarification of his status. Provoo testified that he did not employ the attorney for two reasons: (1) because he felt that the Army would straighten the matter out, and (2) because of lack of funds.

On June 2, 1949, Provoo was released from Walter Reed Hospital, was taken to Fort Meade, notified of the formal charges under the 93d and 96th Articles of War, and confined in the stockade.

The effect of the decision of the Secretary of the Army not to try Provoo on these charges and not to discharge him meant that he was being held indefinitely in confinement. He obtained military counsel on these charges, but his counsel was shortly thereafter transferred, and he did not obtain new counsel until sometime in August. His military counsel were not authorized to advise him in connection with the FBI investigation.

While Provoo was in confinement at Fort Meade, he sent a message to FBI Agent Davis, through his then fiancee, a WAC Sergeant, to the effect that he would like to tell them his side of the story or to give them some statements he would prepare himself. Agent Davis thereupon

interviewed Provoo in a room in the administration building adjoining the stockade at Fort Meade, and returned on twelve occasions during the month of August. He was accompanied during the first interviews by Agent Nelson and during the latter interviews by Agent Anenson; they took four signed statements from Provoo. I find as a fact that the FBI agents did not obtain the statements by any threats or promises, that Provoo was advised of his rights, and that no insulting or degrading language was used to him. However, these interviews continued until August 31, 1949, when Provoo was called away from an uncompleted interview for physical examination preparatory to his transfer to Fort Jay, as hereinafter set out.

While at Fort Meade, Provoo received religious instruction and instruction in Scholastic Philosophy from Chaplain Hayes, who testified that he was singularly lacking in an understanding of Western morality.

Some time during the summer of 1949, the commanding officer of the stockade at Fort Meade was changed, and for no reason that appears in the record Provoo was removed from the stockade to a cellblock in the fire house at Fort Meade, where he was held in individual confinement. On August 22, 1949, General Gerow wrote the Director of Intelligence of the General Staff, reviewing the case, stating that the investigation of the sodomy charges had been completed, and concluded as follows:

> As Provoo has been in confinement since 2 June 1949, action must now be taken to dispose of the charges. In the event he is

> found guilty of the offenses alleged, it is probable that any sentence imposed will include a dishonorable discharge. In view of the instructions by your office and the directives contained in the foregoing communications, instructions as to the disposition of this case are requested.

This letter precipitated a conference on August 23 between representatives of Army and Justice. On that morning, or the evening before, Noel E. Story, an attorney in the Department of Justice, was given a brief resume of the case by his superior, Raymond P. Whearty, First Assistant Attorney General, Criminal Division, and William P. Foley, head of the Internal Security Section of the Criminal Division, and was instructed to attend the conference. Victor C. Woerheide, who had handled the case for Justice up to that time, was out of the country. Present at the conference were Colonel Sargent, Staff Judge Advocate, Second Army, Fort Meade, and Colonel Barlow, from the Intelligence Division of the General Staff, as well as Colonel Miller, the liaison between Army and Justice. Story made the following memorandum of the conference:

> * * * Colonel Sargent stated that it was not the Army policy to proceed with charges of sodomy in the Second Army, in view of the fact that Army medical officials hold that Provoo's actions are not criminal but are as a result of illness. The Department of the Army has held Provoo in confinement at the request of the Department of Justice. In view of the fact that the Second Army does not contemplate proceeding against Provoo for a court martial, the Army cannot hold Provoo in confine-

> ment indefinitely. The Army desires to proceed against Provoo before a Section VIII Board with the hopes of obtaining Provoo's release from the Army. Army officials state that it is impossible to return Provoo to duty at an Army installation because of his moral character. The Army desired an answer from the Department of Justice as to whether it desired Provoo to remain in the service.

At the hearing on the instant motions, Story testified that the statement: "The Department of the Army has held Provoo in confinement at the request of the Department of Justice" was not accurate; that Provoo was originally held on the Army charges, but that sometime during the summer the Army decided not to press those charges and thereafter held Provoo at the request of the Department of Justice. I find this to be the fact.

Following the conference in the Pentagon, Story had another conference with Whearty and Foley. Story's memorandum of August 23, 1949, continues:

> At the conference with Mr. Whearty and Mr. Foley, the Army's views on the Provoo case were discussed. Mr. Whearty does not desire that Provoo be released from confinement and from the Army as long as there is a possibility that the Department may proceed against him in a case of treason. Mr. Whearty advised that he desired the FBI headquarters to wire Mr. Fred Tillman in San Francisco for an opinion on the Provoo case, and to inform this Department as to whether or not he was able to develop overt acts by the requisite num-

ber of witnesses to justify the filing of a complaint on Provoo in the near future in the event he is discharged from the Army and released from confinement.

Information from Mr. Gorman, of the treason section of the FBI, is to the effect that he has received word from Mr. Tillman recently that the Provoo investigation in Japan had been completed and that his report of investigation should arrive in the Departmen the near future.

Following these confe es, Story called Colonel Miller at the Pentag on the telephone. A memorandum of the conversation was prepared. The material parts of the memorandum were as follows:

Mr. STORY. I discussed Provoo situation with Mr. Whearty and Mr. Foley. You people have to take some action; would it be possible for the Army to go ahead and take action under Section 8, and if the action is to the effect that Provoo will be released from the Army, would it be possible that he be discharged in New York so as to bring him within the jurisdiction of the Eastern (Story testified he meant Southern) District Court? The reason for this is that if we pick him up or arrest him in San Francisco, we have to take action within a very short time. We have a little more liberal set-up in New York. We can hold him for a longer time and finish the investigation before seeking indictment. Is it possible for the Army to discharge Provoo in the Eastern (Southern) District of New York, at Governor's Island?

Col. MILLER. Do you have any idea where he entered the service?

Mr. STORY. No, probably in San Francisco, his home. From our standpoint, San Francisco would have been a good place to have him discharged, but because of the fact that we will have to be ready to seek an indictment at the time he will be released, we will have difficulty in having him discharged in San Francisco.

Col. MILLER. Do you plan to have complaint ready at the time of his discharge, and then if you were in New York, you would have more leeway in getting indictment and holding him in the meantime.

Mr. STORY. You understand jurisdiction in treason cases, wherever man is found, or if we bring him from overseas, the point at which he entered the United States. We would have to work out an agreement when you get ready to release him; we will have someone there to arrest him and put him in custody.

Col. MILLER. What is jurisdiction if he is at Fort Meade?

Mr. STORY. We do not want that because it is an undesirable place for us to proceed in cases of treason. We do not get cooperation from the U. S. Attorney or the District Judge.

Col. MILLER. I can't answer offhand. * * *

Mr. STORY. Are you familiar with Section 8 Board? How long to get action?

Col. MILLER. It does not involve too much time. Fort Meade has to have board of officers, under 615, 368, habits and traits of character undesirable. Board meets and considers evidence and reaches its conclusion. There is usually a psychiatric examination.

Mr. STORY. If the Army takes action under Section 8, no reason why they would have to rush things?

Col. MILLER. Some of the generals want it expedited. I think that General Gerow has some idea that he is in an untenable position. I can ask Col. Sargent what his estimate is of the time element.

Mr. STORY. If this is arranged where he can be discharged in New York, we would like to know the exact time when the Army will release him so we can pick him up and get jurisdiction.

Col. MILLER. OK.

Story testified that Whearty told him that one of the reasons for preferring New York was that the staff of the United States Attorney's office in New York was much larger than the staff in Baltimore, and also said that Japanese witnesses might have difficulty finding good hotels in Baltimore. Neither of these reasons appeared in the memorandum, and they were not the controlling reasons. Story testified and reiterated several times that the main consideration of the Department of Justice was that Provoo be held in confinement and not released on bail between the date of arrest and indictment. He further testified that the District Judge in Maryland to whom he referred in the memorandum was the Senior District Judge, now Chief Judge of this court, William C. Coleman; that he did not know the judge, and that he was merely reporting to Colonel Miller what Whearty had told him. The government did not produce Whearty (who is no longer with the Department of Justice) at the hearing on these motions, and offered no evidence

to explain the statement that Maryland would be "an undesirable place for us to proceed in cases of treason. We do not get cooperation from the U. S. Attorney or the District Judge." There had been no treason case in Maryland in over 100 years. Of course, it is not the function of a judge to "cooperate" with either the government or the defendant in a criminal case; and the suggestion that Judge Coleman had not treated properly the representatives of the government in the criminal cases that had come before him, or would not do so in any future case, is entirely without foundation in the evidence and in fact.

Bernard J. Flynn was then and had been for 15 years United States Attorney for the District of Maryland. The suggestion that he would not cooperate with the Department of Justice in a treason case in any way, except that he would not have been a party to denying a defendant his constitutional or other rights, is equally without foundation in the evidence and in fact.

The government also called my attention to the fact that there were then twelve district judges in the Southern District of New York and only two in the District of Maryland. Despite the small size of the staff of the United States Attorney, and the fact that there were only two judges, the District of Maryland had only forty-nine criminal cases undisposed of on June 30, 1949. The ability of Flynn and his staff to prosecute important criminal cases is shown by the record of the prosecution of Philip Frankfeld, et al., the third large communist conspiracy case tried in the United States. In that case the de-

fendants were tried and convicted and the convictions were affirmed by the Fourth Circuit in less than thirteen months after the first indictment. *U. S.* v. *Frankfeld, et al.,* 100 F. Supp. 934, 101 F. Supp. 449, 102 F. Supp. 422, 103 F. Supp. 48, 198 F. (2d) 679.

On August 26, the Assistant Judge Advocate General wrote the Director of Intelligence reporting on the conference of August 23 and the subsequent request from Whearty (evidently through Story) that Justice be informed in advance of the time and place of the separation and, if possible, that the discharge be accomplished within the Southern District of New York. He stated that JAG recommended that the Department of the Army withdraw the restrictions theretofore imposed in connection with Provoo's separation from the service, and that JAG concurred in the request of Justice that the proposed separation be accomplished at Fort Jay, Governor's Island, New York. He further recommended that in view of the court-martial charges then pending against Provoo and the serious character of the offense for which Justice would seek an indictment, that Provoo's transfer from the Second Army to the First Army be accomplished under guard. Thereupon, arrangements were made for the undesirable discharge of Provoo by direction of the Secretary of the Army under AR 615–365, rather than under AR 615–368 and –369, which would have required a hearing before a Board of Officers. The FBI was notified that the discharge would be effected at Fort Jay, Governor's Island, New York, on September 2, 1949. No action was taken

on the charges under the 93d and 96th Articles of War.

In the meantime, the FBI agents were interviewing Provoo practically every day, and taking statements from him. There is no evidence that the FBI had been notified that the Criminal Division of the Department of Justice had decided to seek an indictment. The agents elicited more and more information from Provoo about his activities, and the statement which he signed on August 26, 1949, was the most damaging of all to him, although it was not a confession of treason, and was ruled inadmissible in the New York trial. During the interviews with the FBI agents at Fort Meade, the question whether Provoo should have counsel present was discussed. On one occasion Provoo said that he did not wish to proceed without counsel, but within a matter of minutes changed his mind and stated that he wished to get on with the statement.

On September 2, 1949, Provoo was taken under guard from Fort Meade to the Headquarters of the First Army at Fort Jay, Governor's Island, New York, and required to accept an undesirable discharge. He was immediately arrested by the FBI, taken before a U. S. Commissioner in the Southern District of New York, charged with treason, and removed to the Federal Detention Center, where he was held without bail.

The first witnesses from Japan arrived at the Department of Justice on or about October 1, 1949. Story interviewed them for a week or so in Washington, then proceeded to New York some time in the latter part of October, when hearings before the grand jury were begun. Pro-

voo was indicted for treason by the grand jury for the Southern District of New York on November 17, 1949. He was financially unable to employ counsel, and there was some difficulty in arranging for court-appointed counsel who were able to devote the necessary time to prepare the defense.

In May 1950, defense counsel began their efforts to secure an order for the taking of oral depositions in Japan. Several applications were denied on the ground either that the request was for the depositions of too many witnesses or that proper procedure had not been followed in that what was expected to be proved by the witnesses was not sufficiently shown. Finally, on October 17, 1950, a motion to take the depositions of six witnesses in Japan was granted, but the final order was not signed until February 26, 1951, so that the question whether the expense of defense counsel should be paid by the Department of Justice or by the Administrative Office of the Courts could be decided. On March 15, 1951, Murray Gottesman, one of defendant's counsel, went to Japan and Australia to take depositions.

Meanwhile, on March 11, 1951, Provoo filed a petition for a writ of habeas corpus on the grounds that he was "not a civilian * * * subject to the jurisdiction of the District Court of the Southern District of New York, by virtue of the fact that his purported discharge from the Army was illegal * * *," that he was not "found" in the Southern District of New York but "Forceably thrust therein", and that he had been denied a fair and speedy trial on the charges against him. Neither at that hearing nor at the trial in

New York did the government produce the Army records later obtained from the Army by defendant's appellate counsel, nor Story's memoranda produced at the hearing before me.

At the hearing, on March 16, 1951, Provoo asked for an immediate trial, although his counsel stated that he would refuse to go to trial without the depositions and would withdraw if forced to do so. Judge Goddard dismissed the petition for writ of habeas corpus on the ground that any remedy was by motion under Rule 12, FRCrP and not by habeas corpus.

On May 17, 1951, a defense motion to permit counsel then in Japan to take additional depositions of witnesses was denied. All of the depositions which had been taken were filed in court on or before June 9, 1951.

Defendant's counsel, Gottesman and Plotkin, testified before me that they were ready in the summer of 1951 to proceed to trial, but in October 1951, the case was taken off the trial docket at the request of the government, which then assigned new trial counsel to the case. There is a conflict in the recollection of counsel for the government and counsel for the defendant as to whether the defendant objected to the case being taken off the docket. I find that counsel for the defendant were ready to proceed to trial in the summer of 1951 and objected to that and most subsequent continuance.

On March 3, 1952, Dr. Zinkin, of the USPHS, examined Provoo and reported that "although he is considered legally sane, he is emotionally unstable, prone to hysterical states and has suffered severely under the pressure of long con-

finement. He shows judgment which is not always of the best in critical situations and his insight from the psychological point of view into his own personality make up is extremely poor. The diagnosis that we place on him for clinical purposes is severe mixed psychoneurosis. The laboratory examination was negative. Patient refused a physical examination."

In June, 1952, defendant's counsel moved for an order dismissing the indictment or setting the case down for trial. In July, 1952, Judge Knox set the case for trial before Judge Noonan on October 6, 1952. Defendant's counsel moved for additional particulars in September, 1952, including all administrative and personnel records of the Army. Some of the items requested, but not the essential papers, were furnished after the trial started. The trial actually began on October 27, 1952, and continued to February 11, 1953. Counsel for defendant made certain oral motions to dismiss the indictments, which were denied; but at that time defendant did not have the information, hereinafter referred to, obtained by defendant's appellate counsel after judgment and sentence, nor the facts testified to by Story in the proceedings before me.

When the government closed its case unexpectedly early in December 1952, defense counsel asked and obtained leave to take depositions of certain witnesses in Japan, Australia, and England. The trial was to resume on January 5, 1953. The taking of depositions was handicapped by the long Japanese New Year celebrations, which required the omission of the proposed visit to Australia. An attempt to take

the deposition of a witness in England on the return to New York was frustrated by the fact that the United States consul in London was unable to obtain a court stenographer in a shorter period than three weeks.

Defendant was convicted on four overt acts: the offer of services to the Japanese, the Captain Thomson incident, and participation in two Tokyo broadcasts. The jury disagreed with respect to three overt acts, the government withdrew three overt acts, and the judge directed a verdict for the defendant on two overt acts. The sentence was life imprisonment.

On June 5, 1953, Circuit Judge Swan appointed Colonel Spiegelberg, formerly on the G4 staff of General Eisenhower, to be chief appellate counsel for the defendant. On October 9, 1953, Spiegelberg began his efforts to secure information as to the circumstances surrounding the transfer of Provoo from Fort Meade to Fort Jay, by correspondence with counsel for the Secretary of Defense, who made available to Spiegelberg early in 1954 all of the Army documents covering the period from April 2, 1949, to September 2, 1949, referred to in these findings of facts. Provoo thereupon (April 13, 1954) filed a motion to set aside the sentence of conviction of treason on the ground that he was tried in the wrong district, in violation of Title 18, U. S. C. A., sec. 3238. The motion included an affidavit by Spiegelberg in which he contended that Provoo was "found" in Maryland within the meaning of the venue section. The motion was denied by Judge Noonan on May 12, 1954. *U. S.* v. *Provoo*, 124 F. Supp. 185.

The appeal from the judgment of conviction and the appeal from the denial of that motion were heard together by the Court of Appeals for the Second Circuit on June 17, 1954. On August 27, 1954, the Second Circuit filed its opinion, reversing the judgment of conviction because of the admission of evidence of homosexuality, refusing to pass on other alleged errors in the trial, and reversing Judge Noonan's ruling on the venue motion. *U. S.* v. *Provoo,* 215 F. (2d) 531. On the latter point, the court said: "Had the newly discovered evidence been before the jury, we do not believe that the jury would, or could legally, have found that Provoo was 'first apprehended or arrested or taken into custody' in the southern District of New York under the charges of treason on which he was later indicted. * * * We cannot blind our eyes to the fact that the real purpose in bringing him to New York was to meet the wish of the Department of Justice to have him tried for treason under the indictment subsequently filed here. Consequently we hold that the continuance of Provoo's restraint in Fort Meade, after the Army had dropped the sodomy charge, for the purpose of bringing him to New York for trial, was an apprehension for treason and that he was 'found' in Maryland within the meaning of the venue statute." 215 F. (2d) at 538. The government did not seek certiorari.

Defendant was not released, but was indicted by the grand jury for the District of Maryland on October 27, 1954, was brought to Maryland shortly thereafter, and has been in custody here ever since.

General Wainwright, who testified for the de-

fense in the New York trial, has since died. Warrant Officer Conley, another defense witness has also died since the trial. General Moore, who Provoo says authorized him to interpret on Corregidor, died in 1949. The government has offered in evidence an affidavit indicating on double hearsay that General Moore would not have testified as claimed. Provoo named a dozen or so other members of the armed forces, most of them high ranking officers, who he says were familiar with his activities at various prison camps, who he believes would have testified for him, and who died before October 1949.

It thus appears that Provoo was held in custody in the XI Corps Stockade and in Sugamo prison for over seven months in 1945 and 1946 pending investigation and without any charges being filed against him; that he was held in custody for some time at Fort Meade in 1949 under the instructions to the commanding general not to try him on the military charges and not to release him, so that the FBI investigation begun in 1948 could be completed; and that he was taken to New York in September 1949, charged with treason, and held in custody for more than five years before being indicted and brought to trial in a district having jurisdiction to try the case.

The Government must have known that venue in New York was at least doubtful, in view of the decision of the Supreme Court in *Ex parte Bollman,* 4 Cranch. 75, 136, 2 L. ed. 554; yet the government caused Provoo to be taken under guard from Fort Meade to Fort Jay, for the supposed advantage of proceeding in New York rather than in Maryland. It therefore appears that large part

of the long delay—at least five years—has been due to the deliberate choice of the government, exercised for a supposed advantage.

At the hearing on these motions, the United States Attorney stated that he is disturbed by the fact "that Provoo has been under detention for five years as a result of the error of the Department of Justice." He suggested first that the time in custody should be deducted from the ultimate sentence, if the defendant is found guilty.[1] He suggested later than the court might consider releasing Provoo from custody now, overruling the motions, and proceeding to trial in three weeks. But the damage cannot be cured in that way. The long periods of imprisonment have caused other prejudice to the defendant beside[s] the deprivation of his freedom, with a capital charge hanging over him. He has been handicapped in his ability to locate and keep in touch with possible witnesses. But even more serious has been the effect on Provoo himself. In 1952, Dr. Zinkin, of the United States Public Health Service, diagnosed Provoo's condition as a severe mixed psychoneurosis, and said that "although he is considered legally sane, he is emotionally unstable, prone to hysterical states and has suffered severely under the pressure of long confinement." It is

[1] The United States Attorney evidently had in mind *U. S. ex rel. Leguillou* v. *Davis* (D. C. V. I.), 115 F. Supp. 392, where Judge Maris set aside the conviction because of an improper jury panel, ordered the defendant held for a new trial on the original charge, and said that if he were convicted on retrial the sentencing judge would undoubtedly take into account the time already served. The long opinion did not discuss the question of speedy trial, which apparently was not raised by the relator.

evident to a layman who has observed Provoo in court and in chambers on a considerable number of occasions, that his condition is no better now. His ability to cooperate with his counsel in preparing his defense, and to testify in his own behalf with respect to matters which occurred from 1942 to 1945, has obviously deteriorated during the years in prison.

CONCLUSIONS OF LAW

VENUE

Provoo's motion to dismiss the indictment on the ground that he was not "found" in the District of Maryland within the meaning of Title 18, U. S. C. A., sec. 3238, must be denied, for two reasons:

1. In his motion to vacate the conviction in New York he contended that he was not "found" in New York but that he was "found" in Maryland. On appeal from the ruling of the District Court on that motion, the Second Circuit held "that he was 'found' in Maryland within the meaning of the venue statute." 215 F. (2d) at 538. Therefore, Provoo is now estopped to deny that he was "found" in Maryland. *Nolan* v. *U. S.* (8 Cir.), 163 F. (2d) 768, 770, *cert. den.*, 333 U. S. 846, 68 S. Ct. 649, 92 L. Ed. 1130; *Holdsworth* v. *U. S.* (1 Cir.), 179 F. (2d) 933.

2. On the evidence, he was "found" in Maryland. The facts on this question are essentially the same as the facts before the Second Circuit. Provoo was not apprehended for treason at Fort Dix in 1946, and was not "found" in New Jersey within the meaning of the venue statute.

The seriousness of the charges, particularly those in connection with the secret codes and ciphers and the death of Captain Thomson, on the one hand, and Provoo's long periods of confinement on the other, give point to the admonition of Chief Justice Marshall in *Ex Parte Bollman*:

> As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made a deliberate and temperate inquiry. Whether this inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both. (4 Cranch at 125.)

The offenses charged could not be more serious. But it would be a poor tribute to Captain Thomson to deny to this defendant the rights for which Captain Thomson gave his life.

The right to a speedy trial is of long standing and has been jealously guarded over the centuries. Magna Carta states: "To no one will we sell, to no one deny or delay, right or justice." This provision was implemented by special writs of jail delivery, and later by commissions of general jail delivery, under which special judges cleared the jails twice a year.[2] In 1679 Parliament passed the Habeas Corpus Act, 31 Car II, ch. 2, which required that prisoners indicted for treason or felony be tried at the next sessions or released on bail, "unless it appear to the Judges and Justices upon Oath made, that the Witnesses

[2] II Coke Inst. 43.

for the King could not be produced the same Term, Sessions, or General Gaol Delivery: (2) and if any Person or Persons committed as aforesaid, upon his Prayer or Petition in open Court the first week of the Term or first Day of the Sessions * * *, to be brought to his Trial, shall not be indicted and tried the second Term, Sessions * * * or General Gaol-delivery, after his Commitment, or upon his trial shall be acquitted, he shall be discharged from his imprisonment." That Act, which Blackstone called "the Bulwark of the British Constitution,"[3] was still cherished by the British people at the time our Constitution was adopted,[4] and by American patriots and lawyers, nurtured on Blackstone. Some thought the right of speedy trial and similar rights were so clearly a part of our "liberty" that no Bill of Rights was necessary.[5] But the American people wanted to be sure, and gave the right of speedy trial first place in the Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

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[3] Comm. Vol. 4, p. 438.

[4] Hale's History of the Common Law, 5th Ed., p. 87, et seq.

[5] The Federalist, No. 84.

Congress did not pass any statute defining the term "speedy trial," and I have been referred to no early federal case construing it. But most of the states which ratified the first ten amendments included a provision for speedy trial in their constitutions, and either adopted the British Habeas Corpus Act itself, or passed a similar act.[6] These acts and the decisions of state courts during the next generation[7] throw some light on what the men who adopted and ratified the Sixth Amendment meant by the term "speedy trial."

The period fixed in many of the early statutes was substantially the same as that in the British Habeas Corpus Act, and in many cases defendants were discharged if trial was not had within the specified period. The right was accorded to a slave charged with rape,[8] as well as to free men charged with capital and other serious crimes.[9]

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[6] N. J.—Act 1795, Paterson's Rev. Laws, N. J. 1703–99, p. 168; Md.—Act 1809, c. 125, s. 7; S. C.—Eng. Act, 1 McCord 563 (1822), 2 Brev. 44 (1806); Del.—Act 1793, c. IV S 3; Pa.—Act Feb. 18, 1785, Sec. 3, 16 Serg. & R. 304; N. Y.—Act 1801, c. 65, s. 6; R. I.—S. 11, Habeas Corpus Act, p. 237; Rev. Public Laws, R. I. 1798; Va.—Act 1786, c. 57, 2 Va. Cas. 363; Ga.—Eng. Act, T. U. P. Charl. 24 (1805); Mass.—Act 1784, c. 72, s. 13.

[7] See e. g., *State* v. *Sims*, 1 Tenn. 253 (1807); *State* v. *Stalnaker*, 2 Brev. 44 (S. C. 1806); *State* v. *Spergen*, 1 McCord 563 (S. C. 1822); *Ex parte Joseph Santee*, 4 Va. Reports 363 (1823); *Commonwealth* v. *Cawood*, 4 Va., Reports 527 (1826); *State* v. *Maurignos*, et. al., T. U. P. Charlton 24 (Ga. 1805); *Nolan* v. *Ga.*, 55 Ga. 521 (1875); *Nixon* v. *State*, 2 Smedes & M. 497 (Miss. 1844); *State* v. *Phil*, 1 Stewart 31 (Ala. 1827); *Commonwealth* v. *Sheriff & Gaoler of Allegheny Co.*, 16 Serg. & R. 304 (Pa. 1827).

[8] *State* v. *Phil*, 1 Stewart 31 (Ala. 1827).

[9] *State* v. *Maurignos*, *State* v. *Sims*, *State* v. *Stalnaker*, note 7, *supra*.

Some judges seem to have felt that the accused should be discharged no matter what caused the delay, unless it was caused by the accused;[10] others felt that discharge should be refused where the delay was not the fault of the prosecution.[11] Judge Tod, speaking for the Supreme Court of Pennsylvania in 1827, said:[12]

> I think it was intended to provide against the abuse of a protracted trial, to provide not only against the malice of a prosecutor, but against his negligence, against all *his* delays whether with cause or without cause, against every possible act, or want of action, of the prosecutor; but not to shield a prisoner in any case from the consequences of any delay made necessary by the law itself.

In *Beavers* v. *Haubert*,[13] the Supreme Court said:

> * * * The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.

Professor Black, repeating an oft-quoted definition, says that a speedy trial as provided by the Sixth Amendment, means a trial "free from vexa-

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[10] *State* v. *Phil*, *State* v. *Maurignos*, *State* v. *Sims*, *State* v. *Stalnaker*, *Ex parte Joseph Santee* (dissent), note 7, *supra*.

[11] *Ex parte Joseph Santee*, *Commonwealth* v. *Sheriff & Gaoler of Allegheny Co.*, *Nixon* v. *State*, note 7, *supra*.

[12] *Commonwealth* v. *Sheriff & Gaoler of Allegheny Co.*, note 7, *supra*.

[13] 198 U. S. 77, 87, 25 S. Ct. 573, 576, 49 L. Ed. 950, 954.

tious, capricious, and oppressive delays manufactured by the ministers of justice."[14]

Cooley[15] states:

> Again, it is required that the trial be *speedy,* and here also the injunction is addressed to the sense of justice and sound judgment of the court. In this country, where officers are specially appointed or elected to represent the people in these prosecutions, their position gives them an immense power for oppression; and it is to be feared they do not always sufficiently appreciate the responsibility, and wield the power with due regard to the legal rights and privileges of the accused. When a person charged with crime is willing to proceed at once to trial, no delay on the part of the prosecution is reasonable, except only that which is necessary for proper preparation and to secure the attendance of witnesses. * * *

This rule was applied in *U. S.* v. *Fox,*[16] where the indictment was returned at the November Term 1879; the defendant was tried at that term but the jury disagreed; a second trial at that term resulted in a mistrial because a juror became sick; and the government did not supply funds for a jury at the next term. The court held that the prosecution had been guilty of laches and neglect of duty in failing to prosecute, that such failure was a denial to the defendant of his con-

[14] Black's Constitutional Law, Sec. 266, quoting *Nixon* v. *State,* note 7, *supra.*

[15] Constitutional Limitations (8th Ed., 1927), Vol. 1, p. 645, et seq.

[16] Supreme Court of Montana, 1880, 3 Mont. 512.

stitutional rights, and that he should be discharged.

The same rule has been applied with the same result in many state cases.[17] The defendants were not required to show prejudice in fact. Prejudice may arise from the restraint on liberty for an unreasonable length of time before a conviction, from the harassment of criminal prosecution and anxiety resulting therefrom, and from the possible loss of witnesses by reason of faded memory and inability to locate them.[18]

The right to a speedy trial may be waived, and is waived unless it is demanded by the accused. Most of the federal cases have gone off on this ground.[19]

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[17] *Dickoff* v. *Dewill*, 152 Fla. 240, 9 So. (2d) 804 (1942); *People* v. *Molinari*, 23 Cal. App. (2d) 761, 67 P. (2d) 767 (1937); *Harris* v. *Municipal Court*, 209 Cal. 55, 285 P. 699 (1930); *Ex parte Miller*, 66 Colo. 261, 180 P. 749 (1919); *Von Feldstein* v. *State*, 17 Ariz. 245, 150 P. 235 (1915); *Yule* v. *State*, 16 Ariz. 134, 141 P. 570 (1914); *In re Begerow*, 133 Cal. 349, 65 P. 828 (1901); *State* v. *Phil*, 1 Stewart 31 (Ala., 1827); *State* v. *Sims*, 1 Tenn. 253 (1807); *State* v. *Stalnaker*, 2 Brev. 44 (S. C. 1806); *State* v. *Maurignos*, et al., T. U. P. Charlton 24 (Ga. 1805).

[18] *Frankel* v. *Woodrough* (8th Cir. 1925) 7 F. (2d) 796; *U. S.* v. *McWilliams* (Ct. App. D. C. 1947) 163 F. (2d) 695; *Ex parte Altman* (D. C. S. D. Cal. 1940) 34 F. Supp. 106; *U. S.* v. *Fox*, 3 Mont. 512 (1880); *In re Begerow*, 133 Cal. 349, 65 P. 828 (1901); *U. S.* v. *Kojima*, et al. (U. S. D. C. Hawaii, 1909) 3 Hawaii (Fed.) 381.

[19] *Macknight* v. *U. S.* (1st Cir. 1920) 263 Fed. 832; *Gerardino* v. *Puerto Rico*, (1st Cir. 1928) 29 F. (2d) 517; *U. S.* v. *Rumrich*, (2d Cir. 1950) 180 F. (2d) 575; *U. S.* v. *Holmes*, (3rd Cir. 1948), 168 F. (2d) 888; *Hart* v. *U. S.*, (6th Cir. 1910) 183 Fed. 368; *Carter* v. *Tenn.*, (6th Circ. 1927) 18 F. (2d) 850; *Worthington* v. *U. S.*, (7th Cir. 1924) 1 F. (2d) 154; *O'Brien* v. *U. S.*, (7th Cir. 1928) 25 F. (2d) 90; *Bayless*

In *Frankel* v. *Woodrough*, (8 Cir., 1925) 7 F. (2d) 796, 798, the following dictum appears:

> The Constitution of most of the States have provisions similar to the Sixth Amendment and many of the States have statutory definitions of the time and number of court terms within which criminal accusations must be tried. Such statutes provide usually for the discharge of accused unless the trial is within the limits so defined. The United States has no such statutory provisions and we think an accused would not be entitled to a discharge even though he were denied a speedy trial within the meaning of the Constitution. His right and only remedy would be to apply to the proper appellate court for a writ of mandamus to compel trial.

This dictum has been repeated in a number of later cases,[20] although in the great majority of federal cases before and after *Frankel* v. *Woodrough* the court recognized expressly or impliedly

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v. *U. S.*, (8th Cir. 1945) 147 F. (2d) 169; *Phillips* v. *U. S.*, (8th Cir. 1912) 201 Fed. 259; *Collins* v. *U. S.*, (8th Cir. 1927) 20 F. (2d) 574; *Poffenbarger* v. *U. S.*, (8th Cir. 1927) 20 F. (2d) 42; *Shepherd* v. *U. S.*, (8th Cir. 1947) 163 F. (2d) 974; *Daniels* v. *U. S.*, (9th Cir. 1927) 17 F. (2d) 339; *Collins* v. *U. S.*, (9th Cir. 1946) 157 F. (2d) 409; *Danziger, et al.* v. *U. S.* (9th Cir. 1947) 161 F. (2d) 299; *Pietch* v. *U. S.*, (10th Cir. 1940) 110 F. (2d) 817; *Fowler* v. *Hunter*, (10th Cir. 1947) 164 F. (2d) 668; *Morland* v. *U. S.*, (10th Cir. 1951) 193 F. (2d) 297; *Ex parte Pickerill*, (D. C. N. D. Tex. 1942) 44 F. Supp. 741.

[20] *Shepherd* v. *U. S.*, (8th Cir. 1947) 163 F. (2d) 974; *Daniels* v. *U. S.*, (9th Cir. 1927) 17 F. (2d) 339; *McDonald* v. *Hudspeth*, (10th Cir. 1940) 113 F. (2d) 984; *Fowler* v. *Hunter*, (10th Cir. 1947) 164 F. (2d) 668; *Miller* v. *Overholser*, (Ct. App. D. C. 1953) 206 F. (2d) 415.

that if a defendant does not waive his rights by failing to ask for a speedy trial, he may, in a proper case, be entitled to a discharge because of unreasonable delay in bringing his case to trial.[21] Even in the later Eighth Circuit cases, the court recognized the right to release in a proper case.[22]

In *Ex parte Altman,* (D. C. S. D. Cal., 1940) 34 F. Supp. 106, Judge Yankwich said:

> * * * it is not questioned that the Court, in the exercise of its jurisdiction, has the inherent power to order a dismissal for failure to prosecute. * * *
>
> We can conceive the anarchy which would result if the power to terminate a criminal proceeding for want of prosecution did not exist. Defendants might have prosecutions hang over their heads, like the sword of Damocles, for years, without an effort being made to bring them to trial. And yet, if the prosecutor should refuse

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[21] *MacKnight* v. *U. S.*, *Gerardino* v. *Puerto Rico*, *U. S.* v. *Holmes*, *Hart* v. *U. S.*, *Carter* v. *Tenn.*, *Worthington* v. *U. S.*, *O'Brien* v. *U. S.*, *Bayliss* v. *U. S.*, *Phillips* v. *U. S.*, *Collins* v. *U. S.* (8th Cir.); *Poffenbarger* v. *U. S.*, *Collins* v. *U. S.* (9th Cir.); *Danziger* v. *U. S.*, *Pietch* v. *U. S.*, *Morland* v. *U. S.*, *Ex parte Pickerill*, *supra*, note 19; *Beavers* v *Haubert*, 198 U. S. 77 (1905); *King* v. *U. S.*, (9th Cir. 1954) 216 F. (2d) 665; *Germany* v. *Hudspeth*, (10th Cir. 1954) 209 F. (2d) 15; *D'Aquino* v. *U. S.* (9th Cir. 1951) 192 F. (2d) 338, rehearing denied 203 F. (2d) 390; *U. S.* v. *McWilliams*, (Ct. App. D. C. 1947) 163 F. (2d) 695; *Nolan* v. *U. S.*, (8th Cir. 1947) 163 F. (2d) 768; *Story* v. *Hunter*, (10th Cir. 1947) 158 F. (2d) 825; *Frizzell* v. *U. S.*, (Ct. App. D. C. 1924) 2 F. (2d) 398.

[22] *Collins* v. *U. S.*, (8th Cir. 1927) 20 F. (2d) 574; *Poffenbarger* v. *U. S.* (8th Cir. 1927) 20 F. (2d) 42; *Shepherd* v. *U. S.*, (8th Cir. 1947) 163 F. (2d) 974; *Nolan* v. *U. S.*, (8th Cir. 1947) 163 F. (2d) 768.

> to try them, and the court acquiesce, they would be at his mercy. The constitutional guaranty of speedy trial (United States Constitution, Amendment VI) would be brought to nought, if, when the court set a cause for trial and the prosecutor was not prepared to proceed, the court were powerless to dismiss it for failure to proceed diligently.

The dictum in *Frankel* v. *Woodrough* was based upon the fact that there was no statutory provision directing a discharge. In 1944, the Supreme Court adopted the Federal Rules of Criminal Procedure. Rule 48 deals with "Dismissal"; subdivision (b) of that rule is as follows:

> b. By COURT. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

The note by the Advisory Committee on Rules to subdivision (b) was terse: "This rule is a restatement of the inherent power of the court to dismiss a case for want of prosecution. *Ex parte Altman,* 34 F. Supp. 106, S. D. Cal."

Rule 48 (b) has the same effect in implementing the Sixth Amendment as an Act of Congress would have had. The question was presented to the United States Court of Appeals for the District of Columbia in *U. S.* v. *McWilliams,* (1947) 163 F. (2d) 695. In that case an indictment had been returned on January 3, 1944, charging defendants with subversive activities in violation

of 18 U. S. C. A. 9, 11. The case went to trial before Judge Eicher and a jury on April 17, 1944, and ended in a mistrial some eight months later as a result of Judge Eicher's death. Thereafter on several occasions various defendants moved for trial but without result. In the early part of 1946, Judge Laws was assigned to the case and had a number of hearings on the pending motions to dismiss. The government was not ready to go forward, and on three occasions time was extended in order that new evidence might be obtained if possible. In November 1946, Judge Laws concluded that it was his plain duty to dismiss the indictments for lack of prosecution.

On appeal, the majority of the court, speaking through Chief Justice Groner, said:

> The question for decision on the appeal is (a) whether an action on a motion to dismiss for lack of prosecution is within the sound judicial discretion of the trial judge and (b), if so, under what circumstances may its exercise be controlled on appeal? The answer to the first query is obvious, not only from the provisions of the New Criminal Rules, 18 U. S. C. A., following section 687, but also by the general recognition of the right prior to their enactment. Thus, Rule 48 (b) provides inter alia, "* * * or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information on (sic) complaint." See also *Ex parte Altman*, D. C. S. D. Cal., 1940, 34 F. Supp. 106, 108. * * *
>
> In this case the record shows that from January 1946, to the dismissal order entered near the end of that year the trial court, at the instance of some of the de-

> fendants, again and again sought to compel action which would either result in a trial or dismissal. Its final decision to adopt the latter course seems to us altogether reasonable and proper, and in fact we are not prepared to say it was not compelled in the light of the facts then shown to exist.

No doubt the appropriate procedure in the ordinary case is for the defendant to demand an immediate trial in the district court, and if it is refused, to apply to the proper appellate court for a writ of mandamus to compel trial. But that remedy is not an effective remedy in this case, and was not an effective remedy in New York, where the only speedy trial which could have been obtained was a trial in a district which had no jurisdiction over the offense The government admitted as much at the hearing on these pending motions, but contended that the delay in New York was due to defendant's counsel and not to the government. I do not find this to be the fact. I find that defendant's counsel proceeded with reasonable dispatch, and that about one year's delay was due to the fact that the government assigned trial counsel or new trial counsel to the case after defendant and his counsel were ready for trial. But the principal delays in New York were the law's delays.

Defendant has not waived his right to a speedy trial, in New York or here. In March 1951, he filed a petition for a writ of habeas corpus based upon improper venue and denial of a speedy trial. His counsel were ready for trial in the summer of 1951 and objected to further continuances. His counsel moved for a speedy trial or dismis-

sal of the indictment in June 1952. They also moved to dismiss the indictment when the case was called for trial in October 1952. The pending motions were filed in this court promptly after indictment and appointment of counsel.

The serious delay in this case was not the delay in bringing the New York case to trial, but the delay caused by the deliberate act of the government in bringing the case in New York in the first place, when the government must have known that venue in New York was at best doubtful, and took the chance for the supposed advantage to the government of proceeding in New York.

It was the duty of the United States Attorney and the Attorney General to disclose the true facts to the court at the various hearings in New York.[23] The Army records were not made available until they were obtained from the Department of Defense by Provoo's appellate counsel in 1954, although his trial counsel had called on the government to produce the administrative and personnel records dealing with Provoo. The Second Circuit said:

> * * * Had the newly discovered evidence been before the jury, we do not believe that the jury would, or could legally, have found Provoo was "first apprehended or arrested or taken into custody" in the southern district of New York under the charges of treason on which he was later indicted. (215 F. (2d) at 538.)

[23] *Griffin* v. *U. S.*, (Ct. App. D. C.) 183 F. (2d) 990; *U. S.* v. *Schneiderman*, 106 F. Supp. 731; *U. S.* v. *Ragen*, 86 F. Supp. 382; *Hicks* v. *Hiatt*, 64 F. Supp. 238. See also *Berger* v. *U. S.*, 295 U. S. 78, 88.

The records of the Department of Justice were not produced until the hearing on the present motions.

The government contends that venue is a technical matter, unimportant to the defendant in this case; that the government frequently has a choice of venue, and can exercise that choice for any reason it sees fit, and cannot be required to account for its choice; that the decision to bring the prosecution in New York was an error, similar to an error made by a judge in the trial of a case which brings about a reversal and a new trial, and did not deprive the defendant of any constitutional right.

But questions of venue in criminal cases "are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed." *U. S.* v. *Johnson,* 323 U. S. 273, at p. 275. *U. S.* v. *Provoo,* (2d Cir.) 215 F. (2d) at 539. U. S. Const., 6th Amend., quoted *supra.*

It is true that when the government has a choice of venue it may elect to prosecute in the district of its choice for almost any reason, and that in the ordinary case, at least, the court will not inquire into the reasons for its choice. But where the government chooses to proceed in a certain district in a doubtful case of venue, when venue in another district is clear, the government must be held responsible for the effects of its election.

Counsel for defendant argue that the choice was made in bad faith. The government argues that it was an honest mistake. I find merely that it was a deliberate choice for a supposed advan-

tage, which caused as much oppressive delay and damage to the defendant as it would have caused if it had been made in bad faith.

The government concedes that if the court should find that the defendant cannot have a fair trial at this time, or that further prosecution would deny due process of law, the indictment should be dismissed, but argues that the right to a speedy trial under the Sixth Amendment goes no further than that.

It is not necessary in this case to decide how far rights under the speedy trial provision of the Sixth Amendment may go. It is only necessary to decide the effect of the facts in this case.

The government argued in its brief that defendant's imprisonment in Japan was irrelevant to the issues raised in this proceeding. In *D'Aquino* v. *U. S.*, (9th Cir.) 192 F. (2d) 338 and 203 F. (2d) 391, in dealing with her detention in Japan, the court held first that:

> * * * wholly apart from whether that detention was or was not in accordance with law, it has no bearing whatever upon the question of her right to a speedy trial, which is one that arises after a formal complaint is lodged against the defendant in a criminal case. (192 F. (2d) at 350.)

On rehearing, the court said:

> What appellant argues is that she must be immune to this prosecution because at some former time she was detained for a period when no prosecution was proceeding. First the detention was by the military. Second, whatever may be the situation where detention so immediately precedes the attempted prosecution as fairly to

> be deemed a part thereof, here, the detention had long since terminated. For both reasons, it was clearly no part of the prosecution here under way.
>
> We think that the detention by the military authorities which so long preceded the initiation of the present prosecution is simply not relevant to the question of a speedy trial. (203 F. (2d) at 391.)

Although Provoo's detention in Yokohama and Sugamo prison for seven months without any charges being placed against him may, under that case, be irrelevant to the issue of "speedy trial," the effect of that imprisonment is a circumstance to be considered in deciding whether, under all the facts of this case, trial in 1955 on the charges formally made against Provoo in 1949 for acts alleged to have been committed in 1942–45, could be a "fair trial," as that term is used in recent cases.[24]

In discharging the alleged conspirators in *U. S.* v. *McWilliams, et al.*, Judge Laws said, *inter alia:*

> The defendants have been before the court upon these charges for nearly four and one-half years. All of them were brought here from other parts of the country to stand trial. Because of the im-

[24] See *Rochin* v. *California*, 342 U. S. 165, 169; *Malinski* v. *N. Y.*, 324 U. S. 401, 410, 414, 416–417; *Buchalter* v. *N. Y.*, 319 U. S. 427, 429; *McNabb* v. *U. S.*, 318 U. S. 332, 340; *Adams* v. *U. S.*, 317 U. S. 269, 279; *Lisenba* v. *Cal.*, 314 U. S. 219, 236; *Chambers* v. *Fla.*, 309 U S. 227, 235–236; *Snyder* v. *Mass.*, 291 U. S. 97, 105, 116; *Powell* v. *Ala.*, 287 U. S. 45, 65, 67; *Gouled* v. *U. S.*, 255 U. S. 298, 304; *Hebert* v. *La.*, 272 U. S. 312, 316; *Clemons* v. *U. S.*, (4th Cir.) 137 F. (2d) 302, 304, 305.

> poverished state of eighteen of the defendants, they were represented by counsel not of their own choice, but assigned by the court to serve without compensation. As in all long-delayed cases, the witnesses now are scattered; some are not accessible, more particularly to the defendants who are without funds; the memories of witnesses as to events occurring many years ago are not clear. It is for these reasons among others that the Constitution of the United States requires a speedy trial and that the Congress of the United States has imposed Statute of Limitations to prevent long-delayed prosecutions. I do not see how these defendants now can possibly obtain fair trials. (Quoted in 163 F. (2d) at 696.)

While there is no statute of limitations applicable in treason cases, the other considerations cited by Judge Laws apply with added force in the case at bar. Not only was Provoo imprisoned in Japan for over seven months and released without any charge ever being placed against him, but he has been held in confinement at Walter Reed Hospital, at Fort Meade, and elsewhere ever since the time he was first interviewed by FBI agents in the spring of 1949. He has had no opportunity to locate and interview possible witnesses, many of whom have died or been lost track of. He has been imprisoned more than five years awaiting trial and pending appeal on a capital charge, and has been subject to "the pain and anxiety which must inevitably be suffered by a prisoner who is thus kept on the mental rack", to use the words of Mr. Justice Lamar.[25] The effect on Provoo is shown by the

[25] Dissenting in *Diaz* v. *U. S.*, 223 U. S. 442, 467.

report of Dr. Zinkin, quoted above, and I have found as a fact that it has seriously impaired his ability to defend himself against the charge of treason.

The cases hold that prejudice is presumed, or necessarily follows, from long delay; a *fortiori* it follows when the defendant is imprisoned over the years before trial. But if the government's contention is correct and prejudice in fact must be proved, I find as a fact that such prejudice has been shown.

I conclude that Provoo cannot have a fair trial at this late date, that he has been denied the right of speedy trial within the meaning of the Sixth Amendment, and that there have been unnecessary delays in indicting him and bringing him to trial. Further prosecution of the indictment would violate the fundamental principles of justice and fairness which we must apply even in the case of those charged with the most heinous offenses.

The fairness of the United States Attorney and of the other representatives of the Department of Justice at the hearings on these motions is reassuring. The services of court-appointed counsel for this defendant are a demonstration that the Bar today, as in the past, will protect our liberties with ability and devotion.

Many authorities hold that habeas corpus would be a proper remedy in this case.[26] But in view of

[26] *U. S.* v. *Fox*, 3 Mont. 512 (1880); *Griswold* v. *State*, 77 Fla. 505, 82 So. 44 (1919); *Ex parte Bracey*, 82 W. Va. 69, 95 S. E. 593 (1918); *Von Feldstein* v. *State*, 17 Ariz. 245, 150 P. 235 (1915); *Yule* v. *State*, 16 Ariz. 134, 141 P. 570 (1914). See cases collected at 58 *A. L. R.* 1512–1515.

the adoption of the Federal Rules of Criminal Procedure, and especially Rules 12 and 48 (b), it seems to me that it would be the better practice to grant defendant's motions to dismiss the indictment. I will sign appropriate orders in accordance with this opinion.

In the United States District Court for the District of Maryland

(Criminal No. 23076)

UNITED STATES OF AMERICA

v.

JOHN DAVID PROVOO

ORDER

The Defendant's motion to dismiss the indictment and application for dismissal of the indictment, respectively filed under the provisions of Rule 12 and Rule 48 (b) of the Federal Rules of Criminal Procedure, having come on to be heard by this Court, and after hearing testimony of witnesses and arguments of counsel in open court, and upon consideration of the written briefs filed by the respective parties, for the reasons set forth in an Opinion heretofore filed, it is this 15th day of March, 1955, by the United States District Court for the District of Maryland, ordered, adjudged and decreed:

1. That the Motion To Dismiss the indictment be and the same is hereby Granted and said indictment dismissed.

2. That the Application for Dismissal of the indictment be and the same is hereby Granted

and this Court, in the exercise of its discretion, hereby dismisses the said indictment pursuant to Rule 48 (b) of the Federal Rules of Criminal Procedure.

3. That John David Provoo, defendant in the above captioned case, be forthwith discharged from further custody, detention and confinement and set at liberty upon his own recognizance in the penal sum of $5,000 to await and abide by any further order of this Court or any Appellate Court.

And it is further ordered that if the United States does not enter an appeal from the within Judgment within the time provided by law, the aforesaid recognizance shall be void and the said John David Provoo shall continue at liberty and be forever free from the obligations imposed by said recognizance.

(S) ROSZEL C. THOMSEN,
United States District Judge.

I hereby consent to the form of the within Order this 15th day of March 1955.

(S) GEO. COCHRAN DOUB,
United States Attorney.

In the United States District Court for the District of Maryland

Civil No. 8025

In the Matter of the Petition of JOHN DAVID PROVOO for a Writ of Habeas Corpus

ORDER

The Petition and Writ of Habeas Corpus for the release of John David Provoo having come on to be heard before this Court, respondent having filed a return to the petition and writ, after hearing testimony and arguments of counsel in open court, and upon consideration of the written briefs filed by the respective parties, for the reasons set forth in an opinion heretofore filed, it is this 15th day of March 1955, by the United States District Court for the District of Maryland.

Ordered that the Petition herein be dismissed and the Writ of Habeas Corpus be quashed.

(S) ROSZEL C. THOMSEN,
United States District Judge.

I hereby consent to the form of the within order this 15th day of March 1955.

(S) GEO. COCHRAN DOUB,
United States Attorney.

APPENDIX B—SUMMARY OF PRE-TRIAL PROCEEDINGS IN NEW YORK

November 17, 1949: Indictment returned.

November 22, 1949: Appellee arraigned.

January 10, 1950: Psychiatric report filed, following thorough mental examination of appellee at direction of court.

February 6, 1950: Defense counsel appointed by court.

March 29, 1950: Additional defense counsel assigned.

April 10, 1950: Appearance entered by associate defense counsel.

May 22, 1950: Motion filed by defense counsel requesting a show-cause order for the taking of oral depositions; motion withdrawn the same day upon application of defense counsel.

July 11, 1950: Appellee's motion for issuance of subpoenas argued and denied.

July 21, 1950: Another motion for issuance of subpoenas filed by appellee.

August 18, 1950: Motion filed by defense counsel for an order to take oral depositions of non-citizens and non-residents of the United States; motion denied without prejudice to right to renew before October 15, 1950.

October 17, 1950: Motion of August 18, 1950, *supra,* granted, except as to witnesses in Australia and Japan.

February 26, 1951: Motion of August 18, 1950, *supra,* amended so as to include witnesses in Australia and Japan.

March 16, 1951: Appellee's petition for writ of habeas corpus denied following a hearing which reviewed delays incident to defense requests for the taking of depositions, originally numbering 88, in Japan.

May 17, 1951: Defense motion for the taking of additional depositions denied.

May 26–June 9, 1951: Five defense depositions filed.

June 25, 1951: Defense motion to secure a copy of stenographer's minutes of the proceedings at government expense denied without prejudice.

June 25, 1951: Defense motion for extension of time within which to take depositions authorized by order of February 26, 1951, *supra,* granted.

July 3, 1951: Order granting foregoing motion signed.

July 11, 1951: Motion requesting that one of appellee's attorneys be permitted to withdraw and another attorney appointed in his place, granted; order signed July 17, 1951.

August 29, 1951: Appellee recommitted to Bellevue Hospital for mental and physical examination.

October, 1951: Case removed from trial docket at request of Government for purpose of assigning new trial counsel.

December 12, 1951: Defense motion of December 7, 1951, to amend orders of February 26 and July 3, 1951, granted.

January 22, 1952: Appellee committed to Psychiatric Division of Marine Hospital for examination; diagnosis returned March 3, 1952.

June 25, 1952: Motion filed by appellee to set case for trial or dismiss indictment.

July 10, 1952: Case set for trial on October 6, 1952.

July 29 and August 20, 1952: Defense motions to obtain list of veniremen and trial witnesses filed.

September 24, 1952: Motion for bill of particulars filed by appellee.

October 23, 1952: Appellee's motion for bill of particulars granted in part and denied in part.

October 27, 1952: Trial begun.

U. S. GOVERNMENT PRINTING OFFICE: 1953

FILED
AUG 23 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 195

UNITED STATES OF AMERICA,
Appellant,

vs.

JOHN DAVID PROVOO,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

FREDERICK J. GREEN, JR.,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 195

UNITED STATES OF AMERICA,

Appellant,

VS.

JOHN DAVID PROVOO,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the United States District Court be affirmed on the ground that the question raised by this appeal is rendered so entirely unsubstantial by well settled legal principles and the facts of this case as to require no further argument.

JURISDICTION

Appellee concedes that this Court has jurisdiction to review this case on direct appeal from the District Court by virtue of the fact that the District Court's Order of March 15, 1955, is a decision "sustaining a motion in bar, when the defendant has not been put in jeopardy." 18 U.S.C. 3731.

QUESTION PRESENTED

However vigorously the Government may contend that the question raised by this appeal is whether an "erroneous" selection of venue can permanently bar the Government from further prosecution in the proper district, the facts of the case clearly demonstrate that the only question presented by this appeal is:

Has the Government in 1955 the right to try a defendant for verbal acts of treason alleged to have been committed in Japanese occupied territory in 1942 and 1944 where:

1. The Government, without preferring charges or granting a hearing, confined the defendant in prison in Japan for seven months in 1945 and 1946 while it investigated his alleged treasonable activities.

2. The Government, after giving the defendant reason to believe that he had been completely cleared of all accusations of treasonable conduct and after giving him an honorable discharge from the Army and accepting his reenlistment, proceeded over an extended period of time to build up a case against the defendant — even to the extent of interviewing him while he was confined in a psychiatric ward and interrogating him at a time when he was confined in an Army stockade on serious charges totally unrelated to treason — while evidence favorable to the defendant faded into obscurity.

3. The Government, in a deliberate attempt to select a jurisdiction favorable to the prosecution, had the Army, in violation of standard military procedure, ship the defendant to New York so that waiting FBI agents could "find" him within the meaning of the venue statute.

4. The Government, as a direct result of its aforesaid attempt to select a venue favorable to the prosecution, caused

the defendant to be imprisoned for more than five years before even being indicted in a district having jurisdiction to try the case.

5. The Government, by its hesitation, vacillation and venue machinations, has caused a lapse of nearly ten years between the defendant's first apprehension and confinement by the Government and his proposed trial in the District of Maryland, thereby creating a situation in itself prejudicial.

6. And where as a direct result of the Government's said actions and lack of action, evidence favorable to the defendant has been obscured by the passage of time, the defendant has been seriously handicapped in his ability to locate and keep in touch with possible witnesses and where his own ability to cooperate with counsel and to testify in his own behalf with respect to matters occurring some eleven to thirteen years ago has been seriously impaired.

Or more succinctly stated, has the Government's course of conduct during the ten year history of this case, and the prejudice necessarily resulting therefrom, caused the Government to lose the right to further prosecute the appellee?

CONSTITUTIONAL PROVISIONS INVOLVED

Appellee, in addition to the constitutional provisions cited by the Government (pp. 4 and 5, Statement of Jurisdiction), refers the Court to the following provisions of Article III, Section 2 of the Constitution:

> "The Trial of all Crimes, except in cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

STATEMENT

On October 27, 1954 the United States Grand Jury for the District of Maryland, at Baltimore, indicted the appellee, a former enlisted man in the United States Army for treason in violation of U.S.C. Title 18, Section 1 (1940 Ed.) The indictment charged that appellee, with the requisite intent, had adhered to the Imperial Japanese Government from or about May 6, 1942 and continuously thereafter up to and including August 14, 1945 and further charged that he had committed the following overt acts:

1. That on or about May 11, 1942 at Corregidor, appellee had offered his services to members of the military forces of the Empire of Japan.

2. That on a day between May 6, 1942, and May 30, 1942, at Corregidor, appellee attempted to persuade, advise and induce an American prisoner of war to give information about secret American codes and ciphers to members of the Japanese Army.

3. That on a day between May 6, 1942, and May 30, 1942, at Corregidor, the appellee ordered and commanded an American prisoner of war to give his boots to a Japanese officer and did strike and beat said prisoner of war to compel him to remove and surrender his boots.

4. That on a day between May 6, 1942, and May 30, 1942, at Corregidor, the appellee joined with Japanese in the interrogation of an American prisoner of war and did advise said prisoner of war to give information to the Japanese concerning the location of silver money hidden by the United States Army prior to its surrender.

5. That on a day between May 6, 1942, and May 30, 1942, at Corregidor, the appellee "did report to members of the military forces of the Empire of Japan the name of

Captain Burton C. Thomson, a member of the Armed Forces of the United States who was then held as a prisoner of war by the military forces of the Empire of Japan, as being uncooperative, anti-Japanese and as a threat to the internal security of the military occupation of the Island of Corregidor, Philippine Islands by members of the armed forces of the Empire of Japan which report resulted in the execution of the said Captain Burton C. Thomson by members of the armed forces of the Empire of Japan."

6. That on a day between February 15, 1944, and March 15, 1944, at Tokyo, Japan, the appellee did participate in a certain radio broadcast.

7. That on a day between March 1, 1944, and May 1, 1944, at Tokyo, Japan, the appellee did participate in a certain radio broadcast.

Thereafter appellee moved to dismiss this indictment pursuant to Rules 12 and 48(b) of the Federal Rules of Criminal Procedure claiming that he had been denied a speedy trial as guaranteed by the Sixth Amendment, that further prosecution of the charge would deprive him of rights under the Fifth Amendment, that further prosecution would violate the fundamental principles of fairness and justice and that there had been unnecessary delays in indicting him and bringing him to trial. The same issues were raised by a petition for a Writ of Habeas Corpus ad subjiciendum which petition was denied, from which ruling no appeal has been taken. However, the United States District Court for the District of Maryland granted the motions to dismiss by its order dated March 15, 1955, pursuant to the opinion of District Judge Thomsen (App. A, Jurisdictional Statement, pp. 25-72).

John David Provoo, appellee, was born in California in 1917. After having the equivalent of a high school educa-

tion and having been employed for several years he, in 1940, went to Japan where for less than one year he lived in a Buddhist Monastery, studied Buddhist philosophy and developed his ability to speak Japanese. Early in 1941 in response to a State Department recommendation that all Americans leave Japan, Provoo returned to the United States and enlisted in the United States Army on May 14, 1941. He was promptly sent to the Philippine Islands. After the outbreak of hostilities he was sent to Corregidor and remained thereon throughout its siege by the Japanese until its fall on May 6, 1942. Thereafter, Provoo was continuously held as a prisoner of war on Corregidor, elsewhere on the Philippine Islands, in various prison camps on Formosa and in Japan until approximately August 29, 1945. Five of the seven overt acts alleged in the indictment are alleged to have occurred on Corregidor between its fall on May 6, 1942 and May 30, 1942, while the remaining two overt acts were alleged to have occurred in Japan in 1944.

On August 14, 1945, Provoo was placed under arrest in quarters by the senior American Army officer at Camp Bunka. He remained under arrest at various places until September 12, 1945 when he was arrested by an Army CIC unit pursuant to authority from General McArthur's headquarters. The radio message containing the authority for his arrest is set forth in full at App. A, Jurisdictional Statement, p. 30. Provoo was taken into a jail in Yokohama and then removed to the XI Corps Stockade where he remained until November 16, 1945, when he was removed to Sugamo Prison in Tokyo where he was held until April 4, 1946. While in the XI Corps Stockade and Sugamo Prison, Provoo was interrogated by various representatives of the CIC, one of whom, Milton H. Belinkie, testified that when he first saw Provoo on approximately October 1

1945, Provoo was "very nervous, highly unstable, highly emotional, apprehensive, broke down and cried on a number of occasions and did not seem to know what it was all about and he was very badly oriented, * * * and by the time we left he wanted to make sure that we were going to come back some time in the near future, and I would say that generally he seemed very poorly oriented emotionally and he had no stability" (R. 49-50). Provoo was held in close confinement at Sugamo; he was the only American soldier so confined, and the only other Americans confined there were Mark Streeter and Mrs. Iva Ikuko Toguri D'Aquino. Mr. Belenkie testified that Provoo had asked him to represent him as counsel but that he (Belenkie) was unable to do so. Although Provoo could not recall whether he had asked for counsel, the proof showed that no counsel were available.

After interrogations of Provoo extending for a period of approximately two months, two signed statements were taken by the CIC agents from Provoo. Although Provoo was never tried or given a hearing of any sort he testified that he asked to be returned to duty. When no action was taken, on or about March 22, 1946, Provoo sent to the Commanding General of the Eighth Army a 51-page statement in which he gave his version of the various activities about which he had been interrogated and denied any treasonable conduct. Immediately thereafter the Chief of the Legal Section, AFPAC, recommended that no charges be preferred, and on April 4, 1946, Provoo was released from Sugamo and told that no action would be taken against him (R. 597). Provoo was immediately returned to the United States and sent to Fort Dix, New Jersey where he remained on recuperative leave until August 13, 1946. Shortly thereafter, August 17, 1946, Provoo received an honorable discharge at Fort Dix, and on September 5,

1946 Provoo re-enlisted in the Regular Army for three years at Camp Beal, California.

From the time of his re-enlistment until August 1948 appellee was stationed at various military camps and on at least two occasions was hospitalized by reason of mental instability. Upon his release from Walter Reed Hospital, Washington, D. C. in August 1948, Provoo was assigned to Fort George G. Meade, Maryland, at the request of the Government (DX 14). Appellee testified that he was told that he was on "restricted" status and that throughout his tour of duty at Fort Meade he was given no regular duty assignment. Because of this he said that he became "disturbed" (R. 629), but that almost the only result of his efforts to obtain some duty assignment was to participate in a Special Services show for approximately four weeks. Undoubtedly, appellee's status resulted from a letter dated 3 August 1948 from the Adjutant General to Commanding General, Fort George G. Meade, Maryland, (DX 12), which stated as follows:

> "It is desired that Staff Sergeant John D. Provoo RA 19 052 533, presently assigned to Second Army Headquarters 2101 ASU Fort George G. Meade, Maryland and under investigation by the Intelligence Division GS, U.S.A. be not separated from the service without the express approval of the Secretary of the Army until his investigation has been completed."

Subsequently, in September, 1948, the Federal Bureau of Investigation undertook the investigation (R. 187).

In March, 1949, appellee was detailed to serve as Sergeant of a Guard which brought a military prisoner from Fort Leavenworth to Fort Meade. Upon his return to Fort Meade, complaint was made that Provoo had been guilty of sodomy and other offenses in violation of the 93rd and 96th Articles of War during the course of the trip. A

cordingly Provoo was sent, without protest, to Walter Reed Hospital for evaluation in connection with that charge.

There had been close contact between the Army and the Department of Justice concerning Provoo's status (DX 14-15). On April 1, 1949, at a conference held in the office of the Director of Intelligence, the Judge Advocate of the Second Army (which had jurisdiction over Fort Meade) was instructed that Provoo should not be confined or tried on the sodomy charges (R. 926 and DX 15). As a result of a subsequent meeting on April 5, 1949, General Haislip instructed the Commanding General, Walter Reed Hospital, not to release Provoo under any conditions pending further instructions. However, by an undated letter, presumably prior to June 2, 1949, Lieutenant General Gerow, Commanding General of the Second Army, wrote to the Adjutant General stating that he proposed to confine and prefer charges against appellee under the 96th Article of War alleging an indecent assault against another soldier unless he received instructions to the contrary from the Department of the Army because he felt that appellee's presence at Fort Meade without being incarcerated constituted a danger to Post personnel (DX 15). Apparently the Department of the Army concurred in this action because on June 2, 1949, upon appellee's release from Walter Reed Hospital, he was arrested and placed in the Fort Meade Stockade for the aforesaid alleged violation of the 96th Article of War.

Upon his admission to Walter Reed Hospital, appellee was emotionally disturbed. Colonel Eugene R. Inwood, a psychiatrist, was then Chief of the Neuro-Psychiatric service at Walter Reed. He testified that, upon admission, Provoo was "quite upset" (R. 153) but that he improved during his two months stay. He testified that Provoo was confined in a locked ward, that although he was not psy-

chotic, he had a lot of emotional lability and that he was very easily upset and became very depressed (R. 168-169). He testified that Provoo's medical history for 1948 and 1949, including the history given by him to his attending psychiatrists, was made available to the Department of Justice.

During Provoo's stay at Walter Reed Hospital he was interviewed on April 7, May 1, 4, 5, 9, and 11, 1949, by FBI agents (R. 205). After having first secured permission on April 7, 1949 from Colonel Inwood, the agents on each occasion interrogated appellee concerning recordings of Tokyo broadcasts which were played to him so that he could identify the voices. Finally on May 11, 1949, Provoo signed a statement concerning the broadcasts which statement had been composed during the course of the various interviews. Colonel Inwood testified that he heard that Provoo was quite agitated about these interviews and was quite disturbed about what they were leading up to (R. 157). Colonel Inwood said he remembered quite specifically that a very short time before Provoo left the hospital he came to his office feeling quite "blue and disturbed", that they "had quite a talk about it and it ended up with the discussion that the best thing he (Provoo) could do was to get some peace of mind would be to go back and see if he can't get it straightened out" (R. 157). Colonel Inwood also testified that Provoo told him that he had been told that it was all ended when he was in Japan when he had been released and that he was quite upset that it apparently started in again (R. 158). Although in the statement of May 11, 1949, it was recited that Provoo had been advised of his right to have counsel and that he did not desire counsel, he, on May 12, 1949, requested that the Army appoint counsel to represent him in connection with the treason investigation (DX 5); this request was subsequently denied. In April Provoo had discussed this matter with a

Washington attorney experienced in criminal cases but did not employ him because he felt that the Army would straighten the matter out and because he lacked the funds.

Immediately upon his release from Walter Reed Hospital on June 2, 1949, Provoo was taken to Fort Meade, notified that charges had been preferred against him under the 93rd and 96th Articles of War and was confined in the stockade. Thereafter Provoo sent a message to FBI Agent Davis to the effect that he would like to tell them his side of the story. In response thereto Appellee was visited by FBI Agent Davis on July 29, 1949 and thereafter on August 1, 4, 15, 18, 19, 22, 24, 25, 26, 29, 30 and 31, 1949 (R. 217-18), as a result of which five typewritten signed statements, averaging three to four pages, were secured from appellee, the last of which was incomplete by virtue of the sudden transfer of Provoo from Fort Meade on August 31, 1949. The fourth statement secured from appellee, on or about August 22, 1949 was subsequently offered in evidence at appellee's trial in New York but was not received because the trial court held that it was procured from the defendant at a time when he was illegally detained on the authority of *U. S. v. Bayer*, 2nd Cir., 156 F. 2d 964.

Throughout all of the time that the aforementioned statements were being secured and throughout the whole time Provoo was confined at Fort Meade, the Commanding General of the Second Army was under specific instructions from the Department of the Army not to either discharge or try Provoo. Colonel James L. Nolan, who was then Assistant Staff Judge Advocate in charge of military justice for the Second Army so testified (R. 926). He further testified that after the original charges were placed on June 2, 1949, they were, in accord with the provisions of the Articles of War, referred for investigation and that, after investigation, the charges and investigation were re-

turned to him, at which time it was decided that one of the specifications required additional investigation and they were again referred to the investigating officer. Subsequently, he testified, the charges were again returned to the investigating officer "for them to furnish more specifications, and I believe it required more testimony, if possible, and there was great difficulty in the case because some of the witnesses had been since separated from the Army, and there was also some difficulty in locating the Navy service man" (R. 924). On August 22, 1949, General Gerow wrote to Major General S. LeRoy Irwin, Director of Intelligence for the United States Army that since Provoo had been in confinement since June 2, 1949, action must now be taken to dispose of the charges (DX 16). The proof disclosed that the letter from General Gerow initiated the chain of events which culminated in the transfer of Provoo from Fort Meade, to Fort Jay, New York, on September 2, 1949, on which date he was given an undesirable discharge and arrested by the FBI pursuant to a warrant charging treason.

On August 23, 1949, as a result of General Gerow's letter of August 22, 1949, a conference was held in the office of the Director of Intelligence of the United States Army. This conference was attended by Noel E. Story, an attorney in the Department of Justice, Colonel Sargent, Staff Judge Advocate of the Second Army, Lieutenant Colonel Miller of the Army Judge Advocate General's office, and Colonel Barlow of the Intelligence Division of the United States Army. Mr. Story's memorandum of what transpired at this conference was introduced in evidence as Government Exhibit 9 and is set forth in full in App. B to this motion at pp. 41-42.

Following this conference, Mr. Story, pursuant to instructions received from his superiors, Raymond Whearty,

First Assistant Attorney General, Criminal Division, and William P. Foley, head of the Internal Security Section of the Criminal Division, asked the FBI for the status of its investigative report of the treason charges and was informed that it had recently been completed and would arrive in the Department in the near future. Thereupon, on August 24, 1949, again pursuant to instructions from Mr. Whearty or Mr. Foley, Story contacted Thomas DeWolf, an attorney from the Department of Justice then in San Francisco, and asked that he read the FBI report on Provoo and advise the Department of Justice as to whether a sufficient number of overt acts had been developed to justify a charge of treason (R. 444). Mr. Story, in turn, was advised by DeWolf that the evidence was sufficient to justify a prosecution. When Story communicated this information to Mr. Whearty and Mr. Foley, he was requested by them to contact the Department of the Army to ascertain from it whether or not it was possible to discharge Provoo at Fort Jay, New York (R. 444-6).

Mr. Story in attempting to exculpate the Government, testified that the following reasons (most of which did not appear in GX 10) were then given to him by Mr. Whearty for the latter's desire to have Provoo discharged at Fort Jay which was within the jurisdiction of the United States District Court for the Southern District of New York:

1. Since there was a tremendous amount of work to be done on the case and since the Department of Justice would be unable to assign anyone other than Mr. Story to prepare the case for presentation to a Grand Jury, more assistance could be expected in the Southern District of New York since the United States Attorney's office in that District was the largest and best equipped office in the United States and since the United States Attorney's office in Baltimore had only three or four assistants (R. 447).

2. The Department of Justice "could not expect very much cooperation from the United States Attorney's office in Baltimore, that past experience had proven that the United States Attorney here had been very uncooperative with the Department in certain matters that the Department had presented here in this jurisdiction" (R. 448).

3. It was "the concern of the Department of Justice that Mr. Provoo be held in confinement between the date of the arrest and the return of the indictment because of the fact that this is a capital case and that it is a political case, and if Mr. Provoo were to leave the country the Department could not extradite him for the trial of treason that the Department at that time had decided to proceed with" (R. 448).

4. Mr. Whearty made "reference to the fact that the Senior Judge here in this District Court had shown some antagonism towards Departmental attorneys in proceedings that they had over in this District, and that was another reason why the Department desired to proceed in this case in the Southern District of New York, or not in Baltimore" (R. 449).

5. In presenting the case to the Grand Jury and during the trial it would be necessary to bring several Japanese Nationals to the United States to testify and that since instances have occurred where certain hotels did not accept Japanese Nationals as guests, "they thought that if something like this happened in Baltimore it might antagonize the Japanese witnesses and they felt that the housing problem would be easier to solve in the Southern District or in New York City as far as housing the Japanese witnesses is concerned" (R. 449).

Immediately subsequent to this conversation, and in accord with the instructions, Story, on August 25, 1949, dis-

cussed with Colonel Miller, Department of the Army, the possibility that Provoo be discharged in New York rather than in Maryland. A full transcript of this telephone conversation was introduced in evidence as Government Exhibit 10 and is printed in full in App. B to this Brief, pp. 42-44. It should be noted that in this transcript Mr. Story is quoted as saying that "We have a little more liberal setup in New York" than in San Francisco, and that the Department of Justice did not wish Provoo to be discharged from Fort Meade because "we do not get cooperation from the United States Attorney or the District Judge". Mr. Story further testified that "Mr. Whearty stated that we could select our venue in this case by having Mr. Provoo arrested in the Southern District of New York or wherever the Department desires to proceed" (R. 462).

It is clear from the aforementioned Government Exhibit 10 that the Department of Justice anticipated that the Department of the Army would proceed to discharge Provoo under the provisons of Section 8, AR 615-368 after a finding by a board of officers pursuant to that Section that Provoo possessed habits and traits of character which made his retention in the military service undesirable. However, as is shown by DX 18, 19 and 20, the Department of the Army, after having obtained approval of the Justice Department for Provoo to be discharged at Fort Jay, New York under the provisions of AR 615-365 (which was by direction of the Secretary of the Army and did not require a hearing by a board of officers) ordered that Provoo be transferred, under guard, from Fort Meade to Fort Jay and that the Department of Justice be informed of the time of his discharge so that he could be taken into custody (GX 10).

Accordingly, when shortly thereafter the Department of Justice was informed that Provoo would be discharged at Fort Jay, New York on September 2, 1949, the Depart-

ment of Justice made arrangements for the issuance of a warrant charging Provoo with treason, pursuant to which Provoo was taken into custody at Fort Jay, New York in the Southern District of New York on September 2, 1949.

Thereafter, on November 17, 1949 Provoo was indicted for treason by the Grand Jury for the Southern District of New York. Being financially unable to employ counsel the Court appointed counsel, although there was some delay in securing counsel who could devote the necessary time to prepare the defense. Provoo was not released on bail.

On March 11, 1951, Provoo filed a petition for a writ of habeas corpus on the grounds that he had been illegally discharged from the Army, that he was not "found" in the Southern District of New York but had been "forcibly thrust therein" and he had been denied a speedy trial on the charge against him (DX 8). While his counsel were not then ready to go to trial because of the difficulty in securing the necessary court orders to take the depositions of certain Japanese Nationals, Provoo, at the hearing on March 16, 1951, asked for an immediate trial; however, the petition was dismissed on the ground that the remedy, if any, was by motion under Rule 12 of the Federal Rules of Criminal Procedure and not by Habeas Corpus (GX 11).

Appellee's Court appointed New York Counsel, Gottesman and Plotkin, testified in the present proceeding that they were ready for trial in the summer of 1951 but that in October, 1951, the case was taken off the trial docket at the request of the Government. The District Judge found as a fact that defendant's counsel were ready to proceed to trial in the summer of 1951 and objected to the case being taken off the trial docket in October, 1951, and to most subsequent continuances (App. A Jurisdictional State-

ment p. 47). Shortly subsequent to October 1951, the Government assigned new trial counsel to the case who testified that at that time the case was not then substantially prepared for trial (R. 415).

On March 3, 1952, Dr. Zinkin of the United States Public Health Service examined Provoo in preparation for the trial. His report (DX 31) reported that "although he is considered legally sane, he is emotionally unstable, prone to hysterical states and has suffered severely under the pressure of long confinement. He shows judgment which is not always of the best in critical situations and his insight from the psychological point of view into his own personality make up is extremely poor. The diagnosis that we place on him for clinical purposes is severe mixed psychoneurosis."

In June, 1952, appellee's counsel moved for an order dismissing the indictment or setting the case for trial which the Government opposed. In July, 1952, Chief Judge Knox set the case for trial before Judge Noonan on October 6, 1952. Subsequently a further short continuance was granted, and the trial began on October 27, 1952 and was concluded on February 11, 1953. At the trial the Government merely proved the apprehension of Provoo at Fort Jay, New York and did not produce the documents marked in this proceeding as Government Exhibits 9 and 10, (App. B hereto, pp. 41-44) or DX 12-24, being the documents subsequently supplied by the Army.

In addition to the testimony of a large number of American citizens, the Government introduced testimony from a number of Japanese Nationals. Although the testimony of other Japanese Nationals and other foreign Nationals was deemed necessary by the defense, it was impossible for their personal presence to be secured, and the defense

had to be content with taking the depositions of only some of the foreign Nationals whose testimony was desired. Appellee was convicted on four overt acts and sentenced to life imprisonment.

Subsequent thereto, on June 5, 1953 Circuit Judge Swan appointed George A. Spiegelberg to be Chief Appellate counsel for appellee. On October 9, 1953, Mr. Spiegelberg began his efforts to secure information as to the circumstances surrounding the transfer of Provoo from Fort Meade to Fort Jay. He contacted the U. S. Attorney for the Southern District of New York in this regard but was unsuccessful. He also contacted H. Struve Hensel, then General Counsel of the Department of Defense, who was a personal friend, and through him subsequently received early in 1954 all of the Army documents pertaining to the point which are DX 12-24. On December 14, 1953, Mr. Spiegelberg requested Attorney General Brownell by letter for any Department of Justice documents concerning the transfer of Provoo (DX 3J); when no response was received Mr. Spiegelberg wrote Attorney General Brownell again on December 24, 1953 (DX 3K) and when no response was forthcoming sent a telegram on January 7, 1954 (DX 3A). No response was ever received to these inquiries and the Government Exhibits 9 and 10 (App. B hereto pp. 41-44), said to be the only documents in the Department of Justice bearing on the transfer, were not produced until the hearing below and then only in response to a *subpoena duces tecum* requested by appellee and ordered by the Court over strenuous objection by the United States Attorney. On April 13, 1954, Provoo, by counsel, filed a motion in the United States District Court for the Southern District of New York pursuant to Title 28, U.S.C., Section 2255, asking that his conviction and sentence be set aside on the ground that he was tried in the wrong district, in

violation of Title 18, U.S.C., Section 3238 in that he was not "found" in the Southern District of New York within the meaning of the venue statute. This motion was denied by Judge Noonan on May 12, 1954, *U.S. v. Provoo*, 124 F. Supp. 185, from which denial an appeal was taken.

The appeal from the judgment of conviction and from the denial of the motion were consolidated, and on August 27, 1954, the Court of Appeals for the Second Circuit reversed the judgment of conviction because of improper cross-examination relating to homosexuality and for the reason that Provoo had not been "found" in the Southern District of New York. 215 F. 2d 531. Provoo was not released from custody, but after being indicted by the Grand Jury for the District of Maryland on October 27, 1954, he was brought to the District of Maryland where he remained in custody until the District Court granted his motions to dismiss and ordered him released on March 15, 1955, at which time he had been in custody for more than five and one-half years without having been validly tried on the charges on which he was apprehended on September 2, 1949.

The hearing on appellee's motion to dismiss began on February 3, 1955 and was concluded on March 1, 1955. Twenty-one witnesses, including appellee, testified. The transcript of the hearing totalled 1123 pages. The Government introduced 18 exhibits, while appellee introduced 39 exhibits. By agreement of counsel, a transcript of the testimony of General Wainwright who testified for the defense at the New York trial, and who has since died, was included in the record. The conduct and testimony of appellee at the hearing left no doubt in the mind of anyone present that his ability to defend himself has been seriously impaired as a result of his confinement from September 2, 1949 to March 15, 1955.

THE APPEAL PRESENTS NO SUBSTANTIAL QUESTION

Appellee readily concedes that the Government's actions in the present case clearly amount to a substantial, if not flagrant, depravation of his constitutional rights, but it is this very fact that renders the present appeal so entirely lacking in merit, and the question thereby presented so unsubstantial, as to require no further argument. There are no doubt hypothetical situations of penumbral constitutional import which may raise substantial questions as to the violation *vel non* of the various Fifth and Sixth Amendment guaranties, but the extreme facts of the present case bring the same so completely within the aegis of constitutional safeguards as to leave no room for serious dispute.

The Government, in an attempt to minimize the gravity of its actions, characterizes the District Court's opinion as a holding that a *bona fide* mistake as to venue permanently bars the Government from further prosecution. Intrigued by this erroneous notion, the Government devotes substantially all of its Jurisdictional Statement to an attempt to defend the Government's "good faith mistake" as to venue. Not only is the Government's present argument founded upon an erroneous interpretation of the District Court's opinion, it is based upon a totally indefensible position and one totally at variance with its position below.

The United States Attorney, both in his oral argument and written brief in opposition to the motions to dismiss the indictment, strenuously contended that the District Court had no authority to examine the motives of the Government or to decide the issue of good or bad faith, but that in any event the Government acted in entirely good faith. The Government now points with pride to the fact that the District Court found it unnecessary to decide one

way or the other the issue of good or bad faith. Any solace the Government may find in the fact that the Court did not make an affirmative finding of bad faith on the part of the Government is greatly diminished by the fact that the Court did *not* "expressly refuse to sustain appellee's contention that the Government had acted in bad faith" as stated at page 13 of the Government's Jurisdictional Statement, but rather found it unnecessary to decide the issue as demonstrated by the following passage from its opinion (App. A, Jurisdictional Statement, p. 66):

> "Counsel for defendant argue that the choice was made in bad faith. The Government argues that it was an honest mistake. I find merely that it was a deliberate choice for a supposed advantage, which caused as much oppressive delay and damage to the defendant as it would have caused if it had been made in bad faith."

The Government, both in its memorandum filed below and in its Jurisdictional Statement, has failed to cite a single case holding that the right to a speedy trial, or any other constitutional right, can be violated with impunity unless the defendant can demonstrate that the Government acted in actual bad faith and we respectfully submit that any such suggestion is not only unsound but totally without support in the decided cases. However, were such a finding necessary, the undisputed facts of the case lead to the irresistible inference that the Government in fact acted in bad faith. The Government in its Jurisdictional Statement (note 6, p. 17) attempts to bolster its argument of good faith by citing the Second Circuit opinion (*U. S. v. Provoo*, 215 F. 2d 531) for the proposition that the question of proper venue was arguable. This citation is indeed difficult to reconcile with the Court's opinion in that case, wherein it stated at page 538:

> "Had the newly discovered evidence [present Defense exhibits 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22] been

> before the jury, we do not believe that the jury would, or could legally, have found that Provoo was 'first apprehended or arrested or taken into custody' in the southern district of New York under the charges of treason on which he was later indicted."

Had the Government during the New York proceedings come forward with the documents presently identified as Defense Exhibits 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22 (hereinafter referred to as the "Army Documents") — the documents which the Second Circuit Court of Appeals held sufficient to disprove the New York venue as a matter of law — the appellee would have been spared the five years of confinement in the District of New York. But instead of disclosing such documents as good faith required, the Government, in flagrant violation of its duty both to the Court and to the appellee, failed to disclose such evidence both at the hearing on the appellee's 1951 *habeas corpus* petition (which expressly raised the question of venue) and at the trial of the case itself. In addition to the failure to disclose the Army Documents, the Government failed to disclose the existence of the documents now marked as Government Exhibits 9 and 10 (reprinted in full, App. B, *infra*, pp. 41-44). These latter documents were kept behind a veil of secrecy even after the trial of the case in New York and after New York defense counsel, with considerable difficulty, secured the Army Documents and at a time when the very issue of venue was being contested in the Second Circuit Court of Appeals. It was only after the Government had "proved" venue in the New York trial, after the case had been reversed partly on venue grounds, after the appellee had spent over five years in prison in a District which lacked venue jurisdiction ,after the proceedings in the District of Maryland were brought, after the Maryland United States Attorney had asserted privilege (privilege which the appellee has always maintained did not in fact exist) and

after the District Court had issued a *subpoena duces tecum* to the Attorney General that the Department of Justice came forward and "voluntarily" produced these documents and stated that the whole thing had been a mistake made in good faith — mistakes are not so calculated nor is good faith so long deferred.

The Government, in a further attempt to obscure the issue, implies at p. 17 of its Jurisdictional Statement that the "honest mistake" in selecting venue resulted "because conscientious law enforcement officers erroneously interpretated an ambiguous venue statute." However, it has very carefully avoided any effort to prove that such was the fact in the present case. The Justice Department representative selected to answer the District Court's *subpoena duces tecum* (Mr. Story) readily admitted that, although he had been instrumental in having the appellee transferred to New York, he himself had not been the one who had made the ultimate decision or construed the venue statute in question. He stated that he had acted on instructions received from certain named superiors. The Government did not produce either of the named superiors as witnesses at the hearing on the present motions, although one of the superiors so named was stated to be presently in the employment of the Justice Department, and no effort was made to show that either of said superiors was not amenable to a Government subpoena or otherwise unavailable. In view of this fact, we can only conclude, as apparently the District Court did (App. A, Jurisdictional Statement, p. 42), that the production of these witnesses would not have aided the Government in proving its good faith.

It is entirely inconceivable that any person, let alone a trained lawyer, could in good faith assume that the Government could use the Army to manufacture venue in view of this Court's express statement in the treason case of *Ex*

parte Bollman, 4 Cranch 75, wherein Chief Justice Marshall stated at page 136:

> "But in this case, a tribunal for the trial of the offense, wherever it may have been committed, had been provided by Congress; and at the place where the prisoners were seized by the authority of the commander in chief, there existed such a tribunal. *It would, too, be extremely dangerous to say, that because the prisoners were apprehended, not by a civil magistrate, but by the military power, there could be given by law a right to try the persons so seized in any place which the general might select, and to which he might direct them to be carried.*" (Emphasis supplied.)

Nor is the Government's contention that the legal aspect of the venue question was at least arguable aided by the fact that Judge Noonan erroneously upheld the Government's contention as to venue even after defense counsel had secured the Army Documents. An elementary understanding of human nature is sufficient for the realization that even the most learned Judge would be very reluctant to declare a trial which lasted three and one-half months a nullity at a time when the case was presently on appeal on the merits.

In like manner, had the District Court felt that a decision of the question of good or bad faith was required for the disposition of the motion, the Court's opinion as a whole and the following passage thereof leave little doubt as to the decision which would have been reached, the Court stating (App. A, Jurisdictional Statement, p. 43):

> "The suggestion that he [United States Attorney for the District of Maryland] would not cooperate with the Department of Justice in a treason case in any way, except that he would not have been a party to denying a defendant his constitutional or other rights, is equally without foundation in the evidence and in fact."

The Government has very adroitly phrased its present argument in such a manner as not only to avoid the real bases of the Court's decision but so as to make it appear to be broad and sweeping in scope. However, the Court expressly declined "to decide how far rights under the speedy trial provisions of the Sixth Amendment may go" and decided that the particular facts of the case required the conclusion (1) that appellee had been denied the right of a speedy trial within the meaning of the Sixth Amendment, (2) that appellee could not have a fair trial at this late date, (3) that there had been unnecessary delays in indicting appellee and in bringing him to trial, and (4) that further prosecution of the indictment would violate fundamental principles of justice and fairness.

1. *Appellee Has Been Denied a Speedy Trial.* The Government, although somewhat grudgingly, has admitted in its Jurisdictional Statement that there is such a right as a right to a speedy trial. There is nothing mystic or unusual about this right nor does it place the Government under any burden other than to conform to fundamental standards of justice known in Anglo-American law at least since the time of Magna Carta. The District Court's opinion traces the development of the doctrine of speedy trial from Magna Carta and the ancient Writ of Gaol Delivery up to the present date with such great detail and exhaustive citations as to render repetition thereof superfluous. In like manner, the facts adduced during the ten days of proceedings before the District Court, as reflected in the more than 1,100 pages of testimony taken at the various hearings on the motions below and the numerous exhibits filed, are so adequately summarized in the opinion as to render any extended statement, at this point, of facts showing a violation of appellee's right to a speedy trial, unwarranted prolixity. In this connection it must be noted that the Government in its State-

ment of Jurisdiction has failed to cite a single case which in any manner conflicts with the District Court's holding or which was not considered in the District Court opinion.

Although it may be conceded that the Sixth Amendment is silent as to the precise number of weeks or months which can pass before bringing a criminal defendant to trial, it can hardly be doubted that the passage of nearly ten years from the date of first apprehension and confinement, the last five of which were spent continuously in prison, amounts to a violation of the right to a speedy trial — *a fortiori* where the delays were solely attributable to the Government's deliberate actions and lack of action. The delay transpiring between appellee's first confinement in 1945 and his arrest and confinement in 1949 resulted from unexplained inaction on the part of the Government and the delay from 1949 until his proposed trial in 1955 resulted solely from the Government's deliberate act of selecting a venue favorable to the prosecution. In this connection, it is to be noted that at least one of the reasons why New York was considered a favorable jurisdiction was the fact, as disclosed in Government Exhibit No. 10 (App. B, *infra*, pp. 42-44), that the Government had "a little more liberal set-up in New York" and could "hold him for a longer period of time and finish the investigation before seeking indictment" — a consideration which on its face shows an intention on the part of the Government to delay the orderly procedure of indictment and trial.

The reason for the right to a speedy trial is obvious. A criminal defendant, in addition to the right to be free from confinement for unreasonable periods prior to an indictment and trial, has the right to be free from the harassment of criminal prosecution and the anxiety resulting therefrom, and from the possible loss of evidence by reason of inability to locate witnesses and the faded memory of those

available. *Frankel v. Woodrough* (8th Cir. 1925) 7 F. 2d 796; *United States v. McWilliams* (C.A.D.C. 1947) 163 F. 2d 695; *Ex parte Altman* (D.C.S.D. Cal. 1940) 34 F. Supp. 106; *United States v. Fox* (S. Ct. Mont. Terr. 1880), 3 Mont. 512; *United States v. Kojima, et al.* (U.S.D.C. Hawaii 1909) 3 Hawaii (Fed.) 381. The facts clearly show that not only has appellee been denied the right to a speedy trial but that the evils sought to be prevented by the Sixth Amendment guaranty have manifested themselves with great abundance in the present case. It must be remembered that the right to a speedy trial is a constitutional right the violation of which, as in the case of other constitutional rights, of itself, imports prejudice. Cf. *Glasser v. United States*, 315 U.S. 60, 76; *Snyder v. Massachusetts*, 291 U.S. 97, 116. See also *Russell v. Todd*, 309 U.S. 280, 287, holding that even in civil cases "prejudice may arise from delay alone, so prolonged that in the normal course of events evidence is lost or obscured." Moreover, even though prejudice is presumed, the District Court found as a fact that the defendant had been prejudiced by reason of the loss of evidence, inability to locate possible witnesses, death of witnesses and his lessened ability to defend himself.

The Government contends that it is entitled to notice of a defendant's desire for a speedy trial and in effect states at page 18 of its Jurisdictional Statement that it had no notice that appellee desired to have a speedy trial in New York until June of 1952 when he filed his motion to dismiss or set the case down for trial. On the basis of this contention, the Government attempts to impeach the District Court's finding that appellee had *not* waived his right to a speedy trial. Not only is it difficult to understand why it should come as a shock to the Government that a man who had already been in jail for nearly three years await-

ing trial should want a final disposition of the case, the Government was fully informed that appellee desired a prompt trial at least by March of 1951 when appellee filed a motion for a Writ of Habeas Corpus asserting that even as of that date he had been denied a speedy trial. Moreover, as this Court stated in *Glasser v. United States,* 315 U.S. 60, 70:

> "To preserve the protection of the Bill of Rights for hard pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights. *Aetna Ins. Co. v. Kennedy,* 301 U.S. 389; *Ohio Bell Telephone Company v. Public Utilities Commission,* 301 U. S. 292."

The Government attempts to make much of the Court's finding that the delays transpiring in the New York proceedings were principally "the law's delays" (App. A, Jurisdictional Statement, p. 64). However, the obvious fact that the Government fails to appreciate is that the five years' delay in New York was *occasioned* solely by the deliberate act of the Government in bringing the case to New York in the first place. This factor is specifically pointed out by the District Court in the following passage from its opinion (App. A, Jurisdictional Statement, p. 65):

> "The serious delay in this case was not the delay in bringing the New York case to trial, but the delay caused by the deliberate act of the government in bringing the case in New York in the first place, when the government must have known that venue in New York was at best doubtful, and took the chance for the supposed advantage to the government of proceeding in New York."

In this same vein, the Government, at page 19 of the Jurisdictional Statement, points to the fact that appellee's New York conviction was reversed on the merits as well

as upon the question of venue and from this fact concludes that appellee "would in any event have had to be tried again during 1955, even if the additional error as to venue had not been committed." The obvious fallacy in this line of reasoning is that it is predicated upon a series of unwarranted assumptions. Such contention necessarily assumes (1) that the Maryland District Court would have countenanced a three year delay in bringing the case to trial (the fact that it would not is inferentially admitted by the statements contained in Government Exhibit 10), (2) that the Maryland District Court would have allowed, and the Maryland United States Attorney attempted, cross-examination for the sole purpose of attempting to prove the appellee to be homosexual (the reversible error occurring at the New York trial), and (3) that the Maryland District Court's Criminal Docket was just as crowded as that of the New York Court's (a fact disproven by DX 39). Moreover, such contention completely ignores the fact that the Government's attempt to manufacture venue has resulted in the appellee's having endured five years of confinement awaiting trial and pending appeal in a district without jurisdiction; and that in the event of a second trial in 1955, there is no assurance that a *bona fide* mistake might not be committed necessitating additional delay. In short, the deliberate action of the Government motivated by its attempt to select a favorable jurisdiction has enormously increased the ordinary delays inherent in all litigation from which appellee would obviously have no recourse.

The Government has taken the position that as there is no statute of limitations pertaining to the crime of treason, "Congress has indicated that for treason and other capital offenses the element of times has less weight than with other crimes". If we understand this contention correctly,

the Government is taking the position that Congress by passing, or more correctly failing to pass, a statute of limitations has effectively overridden a specific constitutional guaranty or that constitutional guaranties should not apply in cases of treason — an entirely erroneous proposition. *Ex parte Bollman*, 4 Cranch 75; *Ex parte Milligan*, 4 Wall. 2, 118-119.

In like manner, the obvious reason for there being no statute of limitations in cases of treason and other capital offenses is that the gravity of the offense is such that Congress determined the public good to be best served by giving the Government the right to prosecute the offender without regard to the period of time transpiring between the commission of the crime and the Government's discovery thereof. However, the Sixth Amendment makes no distinction between grave and ordinary crimes but expressly states that in "*all* criminal prosecutions, the accused shall enjoy the right to a speedy and public trial". In conformity with this constitutional mandate, the authorities hold that "the right to a speedy trial obtains without respect to the grade of the crime of which the accused may stand charged", 8 R.C.L., Criminal Law, Section 24, p. 470, and the Government has not cited a single case to the contrary. Further, the right to a speedy trial bears no historical correlation to the concept of limitations. The right to a speedy trial had its genesis in Magna Carta and in the ancient Writ of Gaol Delivery at a time when the concept of limitations was unknown.

In view of the historical development of the right to a speedy trial as opposed to the concept of limitations, it cannot be seriously contended that the act of legislative grace in passing statutes of limitation (or failing to pass them in regard to serious crimes) can have the effect of destroy-

ing or impairing a specific safeguard carried over from the common law into the Sixth Amendment of the Constitution or can give the Government the right to speculate as to the comparative longevity of prosecution and defense witnesses.

2. *The Appellee Cannot Have a Fair Trial at This Late Date.* The Government now seeks to place appellee on trial for his life for alleged overt acts of treason consisting almost entirely of verbal statements, both in the English and Japanese languages, alleged to have occurred some eleven to thirteen years ago, in foreign countries more than six thousand miles removed from the place of trial. The extraordinary passage of time, of itself, bespeaks the manifest unfairness of trial at this late date.

Unless a fair trial can be had where evidence has been lost or obscured over an extended period of time, where the recollection of available witnesses as to verbal statements in two languages has become blurred by the passage of more than a decade, where an indigent defendant has spent the five years immediately preceding the proposed trial in jail, and thus out of touch with possible witnesses, and where long periods of incarceration with the anxiety attending a capital charge have caused a great deterioration in the defendant's ability to cooperate with defense counsel in the preparation of his case and in his ability to testify with respect to matters occurring some thirteen years prior to trial, no fair trial could now be had in the present case.

The difficulty in defending charges of alleged verbal acts of treason so long passed renders it impossible for appellee to be given the basic requirement of due process. This result is rendered inescapable in view of the fact that apart from the enormous difficulty in now locating witnesses,

both in the United States and in foreign countries, appellee is further handicapped by the absence of funds necessary for the defense of a case of this nature and, even with the subpoena rights afforded indigent defendants, he is without power to compel citizens of foreign countries to attend as witnesses at the trial, or even to give sworn statements by way of deposition.

The inherent injustice in permitting a prosecution at the present time is accentuated by the Government's actions in this matter. The seeds of the problems in regard to witnesses and the collection of evidence were planted by the Government as early as 1945. Instead of charging and trying appellee after his liberation from a Japanese prison camp, the Government cast him in Sugamo Prison and kept him there without charge or trial for seven months while the Government investigated his alleged treasonable activities. In addition to the deprivation of his liberty on the basis of mere accusation, appellee was thus effectively prevented from gathering evidence and obtaining proof of his innocence almost at the very scene of some of the alleged offenses, and at a time shortly after their alleged commission, while the Government proceeded to collect and perpetuate evidence to be used against appellee. This situation was aggravated by the assurance of the Government at the time of appellee's release from Sugamo Prison that he had been cleared of all accusations of treasonable conduct. Thus, lulled into a false sense of security appellee returned to the United States, completed his enlistment, was awarded an honorable discharge, and thereafter reenlisted, only to be once again arrested some three years later and called upon to defend himself against the very charges which were responsible for his Sugamo confinement.

Not being content with a trial in the proper district, the Government attempted to manufacture a venue favorable to the prosecution and hereby subjected appellee to five additional years in confinement and greatly increased the already enormous difficulty of defending the case. In this regard, one of the defense witnesses who died after the New York trial and prior to the Maryland indictment was General Jonathan Wainwright. Although it is true that General Wainwright had no direct knowledge of the circumstances surrounding any of the alleged overt acts, his graphic word picture of the nearly indescribable hardship which befell all prisoners of the Japanese could hardly be said to be immaterial to the defense. The Government's suggestion that such testimony could be read by counsel in a subsequent trial as an exception to the hearsay rule, although legally correct, is totally unrealistic. No lawyer with any trial experience could conscientiously maintain that counsels' reading of prior testimony can even approach the effectiveness of testimony from living witnesses. In fact such a proposition borders on the ridiculous in the present case when the suggestion is made that defense counsel read the vivid testimony of one of the Nation's great war-time leaders.

The burden under which an indigent defendant struggles in attempting to defend a case of this magnitude is extreme even when he is promptly tried, but when we add to this already enormous burden the loss of evidence resulting from long periods of delay and appellee's diminished ability to defend himself by reason of his disturbed mental and emotional condition aggravated, if not produced, by long periods of incarceration solely attributable to the Government's improper actions, any contention that he could now be given the fair trial secured by the Fifth Amendment is entirely frivolous and lacking in substance.

In regard to appellee's diminished ability to defend himself, the District Court made the following finding of fact (App. A, Statement of Jurisdiction, p. 52 *et seq.*):

> "But even more serious has been the effect on Provoo himself. In 1952, Dr. Zinkin, of the United States Public Health Service, diagnosed Provoo's condition as a severe mixed psychoneurosis, and said that 'although he is considered legally sane, he is emotionally unstable, prone to hysterical states and has suffered severely under the pressure of long confinement.' It is evident to a layman who has observed Provoo in court and in chambers on a considerable number of occasions, that his condition is no better now. His ability to cooperate with his counsel in preparing his defense, and to testify in his own behalf with respect to matters which occurred from 1942 to 1945, has obviously deteriorated during the years in prison."

The Government, at pages 21 and 22 of the Jurisdictional Statement, attempts to attack this finding and suggests that the record does not sustain the District Court's conclusion in this regard. The basic error of this contention is that had the United States Attorney, after the introduction of Dr. Zinkin's report (Defense Exhibit No. 31) and after observing appellee's actions in court and in the District Judge's chambers on numerous occasions, entertained any serious doubt as to appellee's lessened ability to defend himself, the Government could have requested a postponement of the hearing and had a psychiatric report made.

The reason for defense counsel's not offering any psychiatric testimony as to appellee's present mental and emotional condition is obvious. The only available procedure for obtaining such testimony in the case of indigent defendants is a motion under Section 4244, Title 18 U.S.C., asserting that the defendant is "presently insane or otherwise so mentally incompetent as to be unable to under-

stand the proceedings against him or properly to assist in his own defense". Appellee did not below, and does not now, maintain that he is rendered totally incapable of standing trial, but rather that his ability to defend himself has been materially impaired by reason of the long periods of confinements and the emotional stress resulting therefrom. This being the case, there was no basis for a defense motion to secure a psychiatric report as to appellee's present mental and emotional condition.

3. *There Has Been Unnecessary Delay in Indicting Appellee and in Bringing Him to Trial.* In addition to the constitutional grounds previously discussed, the District Court dismissed the indictment pursuant to Rule 48(b) of the Federal Rules of Criminal Procedure. This Rule gives the Court the power to dismiss an indictment if there is unnecessary delay in presenting the case to a Grand Jury or in bringing the defendant to trial and the ruling on such a motion involves an act of judicial discretion not reviewable except upon the showing of an abuse of discretion. *United States v. McWilliams* (C.A.D.C. 1947), 163 F. 2d 695. In view of the fact that the Government's actions in this matter clearly amount to a violation of constitutional rights, any contention that the District Judge abused his discretion in dismissing the indictment would seem so lacking in merit as to require no extended argument for its refutation. The facts showing that there has been an unreasonable delay in bringing appellee to trial have been discussed above in connection with the right to a speedy trial and there follows below a brief discussion of the facts showing an unreasonable delay in indicting appellee.

The Maryland indictment was returned on the 27th day of October, 1954, and alleges that appellee was "found" at Fort Meade, State and District of Maryland. This "finding"

of appellee in Maryland took place on or before the 2nd day of September, 1949, when the military authorities transported appellee to the Southern District of New York. Thus, although appellee was first apprehended in Maryland in 1949, and the case was then ripe for presentation to a Federal Grand Jury in the District of Maryland, an indictment was not forthcoming until over five years later when the present indictment was returned. The only explanation for this five year delay in indicting appellee, five years during which he was continuously confined, is that appellee, through no action of his own, was thrust into the Southern District of New York to await trial in a District which had no jurisdiction to try the case. When this delay and the Government's responsibility therefor are taken into consideration, there would seem no doubt that the District Court was entirely within its discretionary power in dismissing the indictment.

The Government, in seeking to show an abuse of the Court's discretion in dismissing the indictment, attempts to distinguish the present case from *United States v. McWilliams, supra,* on the ground that in the latter case the Government had continuously requested postponements for the purpose of securing witnesses. This attempted distinction is entirely without merit for the reason that the delays in the instant case were caused by the deliberate actions of the Government in an attempt to secure a supposed advantage and thus not even as excusable as was the Government's forthright efforts to obtain additional witnesses condemned in the *McWilliams* case. In like manner, the reasons given for the dismissal in the *McWilliams* case, quoted in the District Court opinion (App. A, Jurisdictional Statement, p. 68 *et seq.*), apply with even greater force in the instant case.

4. *Further Prosecution Would Violate Fundamental Principles of Justice.* The District Court, as an additional reason for dismissing the indictment, held that "further prosecution of the indictment would violate the fundamental principles of justice and fairness which we must apply even in the case of those charged with the most heinous offenses". The mere recital of the facts of this case abundantly demonstrate the soundness of this conclusion. Even if the Fifth and Sixth Amendments were non-existent, it is respectfully submitted that this Court, in the exercise of its "power of supervision over the administration of justice in federal courts" (*Ballard v. United States*, 329 U.S. 187), would find further prosecution of the present case to violate "civilized standards of procedure and evidence" and affirm the dismissal of the indictment. *McNabb v. United States*, 318 U.S. 332.

CONCLUSION

The District Court's decision is obviously correct and is expressly limited to the particular facts of the present case. It is in no sense novel or far reaching in its effect upon the administration of criminal justice. The ultimate decision of the question presented by the record in this case is peculiarly appropriate for final disposition by the trial judge who personally observed all the witnesses and carefully considered all the facts and the inferences to be drawn therefrom. Unless the Government is entitled to a mere advisory opinion as to how long it may imprison a defendant before trial or to what extent its actions may prejudice a defendant's ability to defend himself and yet not lose the right to prosecute, the present appeal can serve no useful purpose for the reason that the extreme facts presented by the record clearly demonstrate a deprivation of fundamental rights secured by the Fifth and Sixth

Amendments and this Court's inherent power to supervise the conduct of criminal cases in the lower Federal Courts.

It is respectfully submitted that the District Court's decision should be affirmed without further argument.

FREDERICK J. GREEN, JR.,
THEODORE C. WATERS, JR.,
JOHN MARTIN JONES, JR.,
DAVID ROSS.
Attorneys for Appellee.

Since Appellee is indigent and has filed a motion to proceed in *forma pauperis*, the cost of printing this motion and brief was not borne by the Appellee, John David Provoo.

APPENDIX A — CHRONOLOGY OF EVENTS

CHRONOLOGY

1942

May 6—Appellee captured by Japanese.

May 6-30—Alleged commission of five overt acts of treason.

1944

February-May—Alleged commission of two overt acts of treason.

1945

August—Appellee liberated from Japanese prison camp and imprisoned in Japan by United States forces pending investigation of alleged treasonable activities.

1946

April—Released from above imprisonment.

1949

Sept. 2—Appellee thrust into southern district of New York and "found" by FBI agents.
Nov. 17—New York indictment.

1951

March—Petition for writ of habeas corpus based upon improper venue and denial of a speedy trial.

October 15—Case marked off trial docket at government request and over defense objection.

1952

June 25—Defendant's motion to dismiss or grant prompt trial.

July 10—Order setting case down for trial.

Oct. 27—Commencement of trial.

1953

Feb. 11—Appellee convicted of four of alleged overt acts and found not guilty as to others.

1954

Aug. 27—Conviction reversed by Second Circuit Court of Appeals.

Oct. 27—Maryland indictment.

1955

March 15—Order dismissing Maryland indictment.

APPENDIX B — FULL REPRINT OF GOVERNMENT EXHIBITS 9 AND 10

GOVERNMENT EXHIBIT 9

OFFICE MEMORANDUM — UNITED STATES GOVERNMENT

To: Files

FROM: Noel E. Story

SUBJECT: *John David Provoo — Treason*

DATE: August 23, 1949
146-28-1999
AMC:NES:vb

In accordance with a request from Lieutenant Colonel Miller, I attended a conference at the Pentagon Building with reference to John Provoo's confinement in the military stockade at Fort Meade, Maryland. Present at the conference were Colonel Sargent, Staff Judge Advocate of the Second Army, Fort Meade, Maryland, and Colonel Barlow, from the Intelligence Division. Colonel Sargent stated that Provoo had been confined in the military stockade at Fort Meade since June 2, 1949. Provoo was charged with sodomy, and to date no action has been taken with reference to the charge. Colonel Sargent stated that it was not the Army policy to proceed with charges of sodomy in the Second Army, in view of the fact that Army medical officials hold that Provoo's actions are not criminal but are as a result of illness. The Department of the Army has held Provoo in confinement at the request of the Department of Justice. In view of the fact that the Second Army does not contemplate proceeding against Provoo for a court martial, the Army cannot hold Provoo in confinement indefinitely. The Army desires to proceed against Provoo before a Section VIII Board with the hopes of obtaining Provoo's release from the Army. Army officials state that it is impossible to return Provoo to duty at an Army installation because of his moral character. The Army desired an answer from the Department of Justice as to whether it desired Provoo to remain in the service.

At the conference with Mr. Whearty and Mr. Foley, the Army's views on the Provoo case were discussed. Mr. Whearty does not desire that Provoo be released from confinement and from the Army as long as there is a possibility that the Department may proceed against him in a case of treason. Mr. Whearty advised that he desired the FBI headquarters to wire Mr. Fred Tillman in San Francisco for an opinion on the Provoo case, and to inform this Department as to whether or not he was able to develop overt acts by the requisite number of witnesses to justify the filing of a complaint on Provoo in the near future in the event he is discharged from the Army and released from confinement.

Information from Mr. Corman, of the treason section of the FBI, is to the effect that he has received word from Mr. Tillman recently that the Provoo investigation in Japan had been completed and that his report of investigation should arrive in the Department in the near future.

GOVERNMENT EXHIBIT 10

OFFICE MEMORANDUM — UNITED STATES GOVERNMENT

TO: Files

FROM: Noel E. Story

SUBJECT: *John David Provoo; Treason*

DATE: August 25, 1949
146-28-1999
AMC:NES:vb

Notes on phone conversation, Mr. Story and Colonel Miller, Department of the Army, extension 5506.

Mr. Story: I discussed Provoo situation with Mr. Whearty and Mr. Foley. You people have to take some action; would it be possible for the Army to go ahead and take action under Section 8, and if the action is to the effect that Provoo will be released from the Army, would it be possible that he be discharged in New York so as to bring him within the jurisdiction of the Eastern District Court? The reason for this is that if we pick him up or arrest him in San Fran-

cisco, we have to take action within a very short time. We have a little more liberal set-up in New York. We can hold him for a longer time and finish the investigation before seeking indictment. Is it possible for the Army to discharge Provoo in the Eastern District of New York, at Governor's Island?

Col. Miller: Do you have any idea where he entered the service?

Mr. Story: No, probably in San Francisco, his home. From our standpoint, San Francisco would have been a good place to have him discharged, but because of the fact that we will have to be ready to seek and indictment at the time he will be released, we will have difficulty in having him discharged in San Francisco.

Col. Miller: Do you plan to have complaint ready at the time of his discharge, and then if you were in New York, you would have more leeway in getting indictment and holding him in the meantime.

Mr. Story: You understand jurisdiction in treason cases, wherever man is found, or if we bring him from overseas, the point at which he entered the United States. We would have to work out an agreement when you get ready to release him; we will have someone there to arrest him and put him in custody.

Col. Miller: What is jurisdiction if he is at Fort Meade?

Mr. Story: We do not want that because it is an undesirable place for us to proceed in cases of treason. We do not get cooperation from the U.S. Attorney or the District Judge.

Col. Miller: I can't answer offhand. I think under Regulation 3 it would depend on where he entered the service from. I will explore the possibility and let you know. I have had some heat turned on this morning and yesterday. I.D. General is going to be in contact with General Haslip, has indicated his belief that it is an impossible situation for General Gerow to be held back at Second Army. I had call from Col. Sargent of Second Army. Wants to know

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 195

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN DAVID PROVOO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

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1. Appellee seeks to avoid plenary review of the question presented on this appeal by charging the Government, in his motion to affirm, with bad faith in its original choice of the Southern District of New York as the venue of appellee's trial (M.A. 12-16, 21-24).[1] As pointed out in our jurisdictional statement (J.S. 13, 20), the court below, in dismiss-

[1] References to appellee's motion to affirm are indicated by "M.A."; references to the Government's jurisdictional statement by "J.S."; and references to the District Court's opinion, which is set forth in Appendix A of the jurisdictional statement, by "Op. J.S. App. A."

ing the indictment, expressly refrained from accepting this contention made by appellee. Thus, appellee asks this Court summarily to affirm the judgment below, without the benefit of briefs on the merits or oral argument, on the basis of a factual theory he unsuccessfully urged in the District Court and as to which that court made no fact findings in his favor.

a. The court below held that any question as to good or bad faith was irrelevant in determining whether appellee had been denied his right to have a speedy and fair trial, since a good-faith error necessitating a retrial would produce the identical degree of harm, prejudice and delay to an accused as if the mistake had been made intentionally and in bad faith (Op. J.S. App. A 66-67). It was enough, said that court, that the error was the result of "a deliberate choice for a supposed advantage" *(ibid.)*.

As we have already pointed out (J.S. 15-16), every retrial in a criminal case involves delay, expense, and some degree of prejudice to an accused, all of which could have been entirely avoided had the mistake, which caused the reversal of the first conviction, not been made by the trial judge or prosecutor. Many such mistakes are, as here, the result of a "deliberate choice" made by the prosecution "for a supposed advantage" in the belief that the choice is legally permissible and is in the interests of public justice. However, the resulting delays, following a reversal on appeal, have not heretofore been held to involve a denial of the constitu-

tional guarantees of a fair and speedy trial, or to insulate an accused from all further prosecution.

In the instant case, appellee's first treason conviction was reversed when the Court of Appeals for the Second Circuit concluded that two errors had been committed. One error was in the prosecution's initial choice of venue; the other was in the scope of cross-examination conducted by the prosecution. Both of the challenged matters were the result of a "deliberate choice for a supposed advantage" made by conscientious law enforcement officers, and both were sustained as proper by the trial judge. They were only held to be erroneous on appeal after delays which were found to be principally "the law's delays" (Op. J.S. App. A 64). Either error standing alone would have caused identical delay and damage to appellee. Such errors are inevitable under our system of law. Neither as a matter of constitutional right nor of wise judicial administration should the occurrence of such errors operate to free an accused from all further prosecution.

The contrary holding of the court below, attributing to the venue error a deprivation of appellee's right to a fair and speedy trial, is, we submit, patently erroneous, both as a general proposition and as applied to the facts of this case. Furthermore, it is novel and far-reaching in its implications in the effective administration of criminal justice, and, *a fortiori*, cannot be affirmed summarily as presenting no substantial question.

b. While this Court is not the proper forum in

which to litigate a complex factual issue which the lower court held to be legally irrelevant and on which it made no findings, a review of the record will disclose that appellee's charge of bad faith is wholly unwarranted. Government Exhibits 9 and 10, and Defendant's Exhibits 12-22 are the relevant contemporaneous Army and Justice Department documents, and it is from these that appellee principally seeks to infer bad faith (M.A. 22). Not only do they not sustain appellee's contentions, but they affirmatively show the good faith and belief of all concerned that under the venue provisions of 18 U.S.C. 3238, appellee would be "found" wherever he was first arrested on the treason charges, that New York was a more desirable place for trial than Maryland, and that the Army could properly discharge appellee in New York.[2]

2. Appellee suggests (M.A. 29-30) that the Government, in pointing out that there is no statute of limitations for the crime of treason (J.S. 19), is in effect contending that "constitutional guaranties should not apply in cases of treason" (M.A. 30). Appellee misreads the Government's argument. Our point was merely this: The fact that Congress has specifically declared that an indictment for an

[2] In his attempt to prove bad faith, appellee also quotes out of context a sentence from this Court's opinion in *Ex parte Bollman*, 4 Cranch 75, 136 (M.A. 24). The alleged treason in that case was not committed overseas, as in this case, but in a federal judicial district in this country which would have had exclusive jurisdiction of the crime. The venue statute was mentioned by the Court in its opinion, but was declared to have no relevance since the alleged offense was committed in this country (4 Cranch at 136).

offense punishable by death, such as treason, "may be found at any time without limitation", 18 U.S.C. 3281, indicates that an accused cannot be rendered immune from prosecution for such offenses by reason of the lapse of time, thus emphasizing the erroneousness of the decision below. We had previously shown (J.S. 15-19) that the constitutional right to a speedy trial is one which acquires relevance only after a formal complaint has been lodged against the accused. See especially *D'Aquino* v. *United States*, 192 F. 2d 338, 350 (C.A. 9), certiorari denied, 343 U.S. 935.

3. Appellee also argues that it would be unjust to permit him to be prosecuted at this time for acts of treason committed between 1942 and 1945 because Army authorities, following an investigation of a single phase of his alleged treasonable activities—broadcasting for the enemy (see J.S. 5, 6-7)—finally released him without the preferment of formal charges (M.A. 32). However, the acts of treason for which the Government seeks to try him now include five overt acts not involved in the Army investigation (see J.S. 5). Furthermore, even so far as his broadcasting activities are concerned, what appellee's argument comes to is that the dropping of charges because an investigation fails to disclose sufficient evidence on which to press them should immunize the person investigated from future prosecution based on sufficient evidence, which in the meantime has been obtained. The contention is manifestly untenable, and has no more relevance now than when appellee was originally indicted in 1949.

what decision is. Will have to go ahead and explore as quickly as I can. If he is discharged in New York it would involve taking him from Second Army Area to First Army and releasing him there and give him transportation to his place of induction.

Mr. Story: Yes. I don't know what the case was in the Monti case. Monti entered the service in Missouri, was tried in the Eastern District of New York.

Col. Miller: Was he brought back from overseas?

Mr. Story: No. Was brought home after re-enlistment. In Army after he got back here, was discharged in New York.

Are you familiar with Section 8 Board? How long to get action?

Col. Miller: It does not involve too much time. Fort Meade has to have Board of officers, under 615, 368, habits and traits of character undesirable. Board meets and considers evidence and reaches its conclusion. There is usually a psychiatric examination.

Mr. Story: If the Army takes action under Section 8, no reason why they would have to rush things?

Col. Miller: Some of the generals want it expedited. I think that General Gerow has some idea that he is in an untenable position. I can ask Col. Sargent what his estimate is of the time element.

Mr. Story: If this is arranged where he can be discharged in New York, we would like to know the exact time when the Army will release him so we can pick him up and get jurisdiction.

Col. Miller: OK.

CONCLUSION

It is respectfully submitted that the motion to affirm should be denied, and that probable jurisdiction should be noted.

SIMON E. SOBELOFF,
Solicitor General.

WILLIAM F. TOMPKINS,
Assistant Attorney General.

GRAY THORON,
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Attorneys.

SEPTEMBER 1955.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 — 937491 — 907

No. 195. UNITED STATES *v.* PROVOO. Appeal from the United States District Court for the District of Maryland. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE CLARK took no part in the consideration or decision of this case. *Solicitor General Sobeloff, Assistant Attorney General Tompkins, Gray Thoron* and *Philip R. Monahan* for the United States. *Frederick J. Green, Jr.* and *Theodore C. Waters, Jr.* for appellee. Reported below: 17 F. R. D. 183.